

No. 96-1462-CSX
Status: GRANTED

Title: Christopher H. Lunding, et ux., Petitioners
v.
New York Tax Appeals Tribunal, et al.

Docketed:
March 18, 1997

Court: Court of Appeals of New York

Counsel for petitioner: Lunding, Christopher Hanna

Counsel for respondent: Billet, Barbara G.

Ptn due & mld 3-13-97, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Mar 17 1997	G	Petition for writ of certiorari filed. (Response due April 17, 1997)
2	Apr 14 1997		Brief of respondent Commissioner of Taxation and Finance in opposition filed.
3	Apr 29 1997		DISTRIBUTED. May 15, 1997 (Page 2)
4	May 19 1997		Petition GRANTED. SET FOR ARGUMENT November 5, 1997. *****
5	Jun 5 1997	G	Motion of petitioners to dispense with printing the joint appendix filed.
6	Jun 23 1997		Motion of petitioners to dispense with printing the joint appendix GRANTED.
7	Jul 2 1997		Brief of petitioners Christohper Lunding and Barbara Lunding filed.
8	Aug 1 1997		Brief of respondent Commissioner of Taxation and Finance filed.
9	Aug 4 1997		Brief amici curiae of Ohio, et al. filed.
10	Aug 27 1997		Reply brief of petitioners Christopher Lunding and Barbara Lunding filed.
11	Sep 16 1997		Record filed.
12	Sep 16 1997	*	Partial record proceedings Court of Appeals of New York.
13	Sep 26 1997		CIRCULATED.
			Record filed.
		*	Original record proceedings Tax Appeals Tribunal of New York.
14	Oct 2 1997		Record filed.
		*	EXHIBIT D of Administrative proceedings, Division of Tax Appeals.
15	Nov 5 1997		ARGUED.

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1996

CHRISTOPHER H. LUNDING,
BARBARA J. LUNDING,

Petitioners,

—v.—

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,
COMMISSIONER OF TAXATION AND FINANCE OF THE
STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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54 PP

QUESTION PRESENTED

Did the court below err in holding that New York Tax Law Section 631(b)(6), which discriminates against nonresidents of New York who pay New York State income tax by expressly denying them entirely a tax deduction for alimony payments which New York residents are allowed fully to take, does not violate the Privileges and Immunities Clause (Article IV, Section 2) of the United States Constitution?

PARTIES TO THE PROCEEDING

Respondents the Tax Appeals Tribunal of the State of New York and the Commissioner of Taxation and Finance of the State of New York were the Respondents-Appellants below. Petitioners Christopher H. Lunding and Barbara J. Lunding were the Petitioners-Appellees below.

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CHRISTOPHER H. LUNDING,
BARBARA J. LUNDING,

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—v.—

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,
COMMISSIONER OF TAXATION AND FINANCE OF THE
STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

Petitioners Christopher H. Lunding and Barbara J. Lunding ("Petitioners") respectfully petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York below, dated December 18, 1996, is reported at 89

N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62 (1996); App. 1a.¹ The opinion of the Appellate Division of the Supreme Court of the State of New York—Third Department below, dated March 14, 1996, is reported at 218 A.D.2d 268, 639 N.Y.S.2d 519 (3d Dep't 1996); App. 11a. The Decision of the Tax Appeals Tribunal of the State of New York below, dated February 23, 1995, is reproduced at App. 16a. The Determination of the Administrative Law Judge of the State of New York—Division of Tax Appeals below, dated April 28, 1994, is reproduced at App. 25a.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on December 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case invokes the Privileges and Immunities Clause, U.S. Const. Article IV, Section 2, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The statute which Petitioners seek to have declared unconstitutional is Section 631(b)(6) of the New York Tax Law, which provides that "The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources."

¹ "App." refers to the appendix filed with this Petition for a Writ of Certiorari.

STATEMENT

This Petition seeks certiorari to review a judgment of the Court of Appeals of the State of New York, that State's highest court, which held that Section 631(b)(6) of the New York Tax Law ("Section 631(b)(6)") was not unconstitutional under the Privileges and Immunities Clause, the Commerce Clause or the Equal Protection Clause of the United States Constitution. In this Petition, only review under the Privileges and Immunities Clause is sought.

The procedural history of the case is correctly summarized in the opinion below of the Court of Appeals of the State of New York. Challenges to Section 631(b)(6) on federal constitutional grounds explicitly were raised by Petitioners at all administrative review levels of the proceedings below, as well as in all proceedings in the courts below. *See Lunding v. Tax Appeals Tribunal*, 89 N.Y.2d 283, 285-86 (1996) ("Lunding II"), reproduced at App. 1a; *Lunding v. Tax Appeals Tribunal*, 218 A.D.2d 269, 269-70, 639 N.Y.S.2d 519, 519-20 (3d Dep't 1996) ("Lunding I"), reproduced at App. 11a; Determination of Administrative Law Judge in *In re Lunding*, DTA No. 810921 (April 28, 1994) ("ALJ Determination") at 1, reproduced at App. 16a. Indeed, it has been stipulated that if Section 631(b)(6) is constitutional, the Lundings owe additional New York State income tax and if it is not, they do not. ALJ Determination at 3, ¶ 6, reproduced at App. 25a.

The relevant facts are quite simple, and are set out in the court opinions below. In 1990, Petitioner Christopher H. Lunding was a partner in a New York City law firm, and derived substantial income in New York from his law practice there. Petitioners were residents in that year of the State of Connecticut and therefore timely filed a joint nonresident New York State personal income tax return. In 1990, Mr. Lunding paid \$108,000 of alimony to a former spouse; and Petitioners took a deduction on their 1990 New York nonresident income tax return for \$51,934, or 48.0868% of that

alimony. This percentage represented the percentage of Petitioners' total 1990 income earned in New York. Petitioners' deduction for alimony paid was denied solely on the basis of Section 631(b)(6), which provides that "The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." Because of the denial of this alimony deduction, Petitioners' income for New York purposes was increased by a like amount (\$51,934), resulting in an assessment for additional 1990 New York State income tax in the amount of \$3,724, plus interest. *See Lunding II*, 89 N.Y.2d at 285, App. 2a; ALJ Determination at 3, Paragraph 5, App. 27a. It is conceded that residents of New York State are allowed to deduct the entire amount of alimony paid in a given year in determining their taxable income for New York State income tax purposes.

In order to appreciate fully the genesis and context of the matters raised in this Petition for a Writ of Certiorari, it is necessary to understand the events which led to the passage of Section 631(b)(6), which was added to the New York Laws in 1987. It is indisputable that there is not one word of legislative history for this statute, *Lunding I*, 218 A.D.2d at 271, 639 N.Y.2d at 521, reproduced at App. 14a. Indeed, until Petitioners commenced these proceedings, the only intended purpose for it ever advanced by any instrumentality of the State of New York was in an advisory opinion of the New York State Tax Commissioner in *In re Rosenblatt*, [1989-1990 Transfer Binder] N.Y. St. Tax Rep. (CCH) ¶ 252-998, at 17,968 (Jan. 18, 1990), in which it was declared that Section 631(b)(6) was intended "specifically [to] revers[e] *Friedson [sic] v. State Tax Commission*, 64 N.Y. 76 (1984)."

The case referred to is *Friedsam v. State Tax Commission*, 98 A.D.2d 26, 470 N.Y.S.2d 848 (3d Dep't 1983), *aff'd*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984). The facts there were strikingly similar to those in the case at hand. Mr. Friedsam was a Connecticut resident employed in New

York, and claimed alimony payments on his New York State income tax return in an amount proportionate to the relationship between his New York salary and his total income. Friedsam's deduction for alimony was disallowed by the New York tax authorities under then existing nonstatutory New York tax policies, and he sued to have that disallowance annulled and a judgment entered "holding that because a [New York] resident is allowed alimony paid as an adjustment against income while a nonresident is not, the disparity in treatment without a substantial reason is violative of the privileges and immunities clause" 98 A.D.2d at 27, 470 N.Y.S.2d at 849.

In the *Friedsam* case, The Appellate Division of the Supreme Court of the State of New York—Third Department (the "Appellate Division") held that New York's disallowance of a deduction for alimony to nonresidents such as Mr. Friedsam violated the Privileges and Immunities Clause, noting that under the challenged New York tax policy "it makes no difference where an alimony recipient lives, where the marriage and divorce took place, where the awarding divorce court was situated, or whether the recipient is taxed by New York. The only criterion is whether the payer [of alimony] is a resident or nonresident [of New York]. Without more, there results a constitutional violation which we may not condone." 98 A.D.2d at 29, 470 N.Y.S.2d at 850. On appeal, the New York Court of Appeals affirmed *Friedsam* on statutory grounds alone, holding that the disallowance of Mr. Friedsam's proportionate deduction of alimony violated the "policy of substantial equality" established by the tax statutes of New York then in effect. 64 N.Y.2d at 81-82, 473 N.E.2d at 1184, 484 N.Y.S.2d at 810. Subsequently, Section 631(b)(6) was enacted to revoke this "policy of substantial equality," which led to the proceedings which are the subject of this Petition for a Writ of Certiorari.

In the instant case, the Appellate Division followed its decision in *Friedsam* and unanimously held that Section

631(b)(6) is unconstitutional under the Privileges and Immunities Clause. *Lunding I*, 218 A.D.2d at 272, 639 N.Y.S.2d at 521, App. 15a. However, the New York Court of Appeals reversed and reinstated Section 631(b)(6), reasoning that this statute did not violate the Privileges and Immunities Clause, even though it imposed unequal taxation on nonresidents (which, indeed, evidently was its entire purpose and intended effect), for the purported reasons that "New York's treatment of alimony deductions is rationally related to its substantial policy of taxing only those gains realized and losses incurred by a nonresident in New York, while taxing residents on all income from whatever sources. Further, the challenged treatment is rationally related to its policy of limiting a nonresident's deductions to those attributable to income-producing activities in New York." 89 N.Y.2d at 291, App. 9a. For the reasons set forth below, this reasoning is specious; and there is no precedential support for using such factors to turn away a challenge to constitutionality of a statute based on the Privileges and Immunities Clause. Accordingly, Certiorari should be granted and Section 631(b)(6) declared unconstitutional.

REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari in this case should be granted for two reasons set forth in Rule 10 of the Rules of the United States Supreme Court, *first*, because here the Court of Appeals of the State of New York, that State's court of last resort, "has decided an important federal question in a way that conflicts with the decision of another state court of last resort," (Sup. Ct. R. 10(b)) and, *second*, because it "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

A. There Is A Clear Conflict Between The Opinion Below And The Decisions Of Other State Courts Of Last Resort

Establishing the existence of grounds to invoke this reason to grant Certiorari are two decisions of courts of last resort of States other than New York, specifically, the State of Oregon and the State of South Carolina. In fact, in *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988), the Supreme Court of Oregon has reached a judgment exactly contrary to the decision for which a Writ of Certiorari is sought here, based on indistinguishable facts. In *Wood*, the Oregon Supreme Court considered a challenge, under the Privileges and Immunities Clause, to an Oregon statute which denied a deduction for alimony to nonresidents while Oregon residents were allowed such a deduction. The plaintiff, Wood, practiced law in Oregon as a partner in a Portland, Oregon law firm, but resided in the State of Washington. The Court stated that "[t]he narrow question before this court is whether the distinction between the tax treatment of alimony payments of residents and nonresidents is an unconstitutional infringement on plaintiffs' rights under the federal Privileges and Immunities Clause." 305 Or. at 26, 749 P.2d at 1170. It squarely held that "[t]he alimony deduction is denied purely on the basis on nonresidence. As such, the taxing statutes eliminating the deduction are unconstitutional" 305 Or. at 33, 749 P.2d at 1174.

Unable to distinguish either the reasoning or the result in *Wood*, the New York Court of Appeals simply ignored it in its opinion below. The other case in which a state court of last resort reached a legal conclusion in clear conflict with that reached below is *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985). That case correctly is acknowledged in the opinion of the New York Court of Appeals below to support a proposition of law contrary to its reasoning and result. See 89 N.Y.2d at 283.

Spencer did not involve a specific discrimination against nonresidents in the deduction of alimony; rather, at issue there was the constitutionality of a South Carolina statute which (absent reciprocity) broadly prohibited a nonresident from allocating to South Carolina any portion of *any* of his or her nonbusiness deductions in computing his or her taxable income in South Carolina. The plaintiffs in *Spencer* lived in North Carolina, but Mr. Spencer was employed in South Carolina. The Supreme Court of South Carolina found that "[t]he discrimination against nonresident taxpayers in the case at bar clearly burdens their privilege of earning a living in the neighboring state of South Carolina" and held that "denying nonresidents nonbusiness deductions . . . allowed for South Carolina residents who work in the State violates the Privileges and Immunities Clause." 281 S.C. at 495-96, 316 S.E.2d at 388.

Wood and *Spencer* cannot be harmonized with the opinion below; in fact, they are directly contrary to it both in reasoning and in result. This presents a clear conflict among courts of last resort of three States on an important federal question, which should be addressed by a grant of a Writ of Certiorari to Petitioners here.

B. There Is A Clear Conflict Between The Opinion Below And The Relevant Decisions Of This Court

Quite apart from the obvious conflict with decisions of other State courts of last resort, the opinion of the New York Court of Appeals below clearly is in conflict with the relevant decisions of this Court on an important federal question. Discriminatory taxation of nonresidents has been held by this Court to be unconstitutional under the Privileges and Immunities Clause at least since 1870, when this Court decided *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870). There, this Court held that the Privileges and Immunities Clause, among other things, "plainly and unmistakably secures and protects the right of a citizen of one State . . . to be exempt from

any higher taxes or excises than are imposed by the State upon its own citizens." 79 U.S. at 430. Amplifying upon these rights, this Court observed that "it should not be forgotten that the people of the several States live under one common Constitution, which was ordered to establish justice, and which, with the laws of Congress . . . is the supreme law of the land; and that the supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of other States." 79 U.S. at 431.

Ward, which struck down a discriminatory tax on nonresident merchants, was followed by *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), which declared unconstitutional under the Privileges and Immunities Clause a New York statute which denied to nonresidents employed in New York personal exemptions from taxation which residents of New York enjoyed. In *Travis*, as here, the obvious discrimination in taxation against nonresidents was attempted to be justified by arguments that New York taxed the entire income of residents but exempted from taxation in New York many types of income of nonresidents; but this explicitly was held not to counterbalance the patent discrimination of denying nonresidents the exemptions from taxation which New York residents enjoyed. *Travis*, 252 U.S. at 81. This Court noted that proper analysis should focus on "the concrete, the particular incidence" of the discriminatory tax and stated that the discrimination in issue there was "not a case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . ; but a general rule, operating to the disadvantage of all non-residents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State" and thus unconstitutional. *Travis*, 252 U.S. at 80-81 (citation omitted). Compare *Shaffer v. Carter*, 252 U.S. 37 (1920) (dictum).

In more recent times, *Travis* was followed and cited with approval in *Austin v. New Hampshire*, 420 U.S. 656 (1975), a

case in which this Court declared unconstitutional under the Privileges and Immunities Clause a New Hampshire statute which had the discriminatory effect of taxing nonresidents working in that State, when New Hampshire residents were not similarly taxed. In *Austin*, this Court observed that in examining the validity of discriminatory taxation of nonresident individuals, its prior cases have reflected "an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review *substantially more rigorous* than that applied to state tax distinctions among, say, forms of business organizations or different trades or professions," 420 U.S. at 663 (emphasis supplied), and have established "a *rule of substantial equality of treatment* for the citizens of the taxing State and nonresident taxpayers." *Id.* at 665 (emphasis supplied). Cf. *Williams v. Vermont*, 472 U.S. 14, 23 (1985) (holding under the Equal Protection Clause that "[a] State may not treat those within its borders unequally solely on the basis of their different residences")²

Turning from these generalities to the case at hand, *first*, there can be no question that Section 631(b)(6) was enacted for one reason and one reason only: Generate revenue at the expense of nonresident individuals by denying them any tax deduction for alimony payments, a deduction which is allowed without limit to New York residents. Obviously, this statute is a "general rule, operating to the disadvantage of all non-residents" who pay alimony. *Travis*, 252 U.S. at 81.

Once such discrimination is shown, under the established precedents of this Court the State which enacted the chal-

² Recently, in *United Services Automobile Association v. Curiale*, 88 N.Y.2d 306, 313 n.5, 668 N.E.2d 384, 388 n.5, 645 N.Y.S.2d 413, 417 n.5 (1996), the New York Court of Appeals acknowledged these principles in holding unconstitutional a discriminatory New York statute which denied a tax credit to a foreign insurance company. However, it ignored these principles here, where the rights of nonresident individuals were in issue.

lenged statute must demonstrate a " 'substantial reason for the discrimination [against nonresidents] beyond the mere fact that they are citizens of other States.' " Such a reason would not exist "unless there is something to indicate that non-citizens constitute as particular source of the evil at which the [discriminatory] statute is aimed". Put differently, there must be a " 'reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.' " *Hicklin v. Orbeck*, 427 U.S. 518, 525-26 (1978) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396, 399 (1948)). Here, there is neither any evil, nor danger, nor legitimate reason whatsoever for the blatant discrimination practiced by this statute of the State of New York against nonresidents; rather this disadvantage is visited upon them for one reason and one reason only: They do not reside in New York.

The federal question presented here is important for other reasons as well. *First*, focusing purely on deductibility of alimony, statistics show that in 1990, it is estimated that an adjustment for alimony paid was claimed on more than 650,000 federal income tax returns and that the aggregate amount so claimed exceeded \$4.9 billion. Internal Revenue Service, Statistics of Income—1993, *Individual Income Tax Returns* (1996), at 6, Table A. *Second*, and more fundamentally, nonresident wage earners, unlike businesses, generally have no deductions related to their employment. Thus, if the decision of the New York Court of Appeals here is allowed to stand, States may take encouragement in denying to nonresident wage earners all deductions extended to resident taxpayers, resulting in a serious erosion of the principles of federalism and freedom of employment which the Privileges and Immunities Clause is intended to protect.

In short, whether the label given by the State of New York to the tax advantage denied to nonresidents is a personal exemption (as in *Travis*), a credit (as in *Curiale*) or a deduction (as here), the practical effect is to discriminate (by rais-

ing their taxes) against nonresidents who cannot vote in New York and therefore have no voice in the legislative processes of that State. This plainly is unconstitutional, and the Petition for Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: March 14, 1997

Respectfully submitted,

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APPENDICES

1a

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

3 No. 260

In the Matter of Christopher H. Lunding et al.,

Respondents,

—v.—

Tax Appeals Tribunal of the State of New York,

Respondent,

Commissioner of Taxation and Finance
of the State of New York,

Appellant.

ANDREW D. BING, for appellant.

CHRISTOPHER H. LUNDING, *pro se*, for respondents.

OPINION

KAYE, CHIEF JUDGE:

In this combined action for a declaratory judgment and article 78 relief petitioners challenge the constitutionality of Tax Law § 631(b)(6), which disallows nonresidents a full deduction for alimony payments from their New York State income tax liability. The central question before us is whether Tax Law § 631(b)(6) violates the Privileges and Immunities

Clause of the United States Constitution. We conclude the statute is constitutional.

Petitioners Christopher H. Lunding and his wife Barbara J. Lunding are Connecticut residents. In 1990, Mr. Lunding, a partner in a New York City law firm, derived substantial income from the practice of law in this State. On their joint New York nonresident tax return filed for the year 1990, they reported a Federal adjusted gross income of \$788,210, which included an adjustment of \$108,000 for the full amount of alimony that Mr. Lunding had paid that year to his former spouse, also a Connecticut resident. On their return petitioners adjusted their New York State gross income by 48.0868% of the alimony payments—equaling \$51,934—which represented the percentage of Mr. Lunding's 1990 claimed New York business income.

Relying on Tax Law § 631(b)(6) the Audit Division of the Department of Taxation and Finance denied the alimony deduction and recalculated petitioners' New York tax liability, concluding that they owed an additional \$3,724. A Notice of Deficiency in that amount followed.

Petitioners then filed an administrative petition with the Division of Tax Appeals challenging the Notice of Deficiency on the ground that Tax Law § 631(b)(6) was unconstitutional. Specifically, petitioners claimed that the tax which was the subject of the Notice of Deficiency cannot be collected because the statute and the Department's actions discriminate illegally against nonresidents in violation of the Privileges and Immunities, Equal Protection and Commerce Clauses of the United States Constitution.

The Administrative Law Judge sustained the disallowance, holding that the Tax Appeals Tribunal lacked authority to declare the statute unconstitutional. In their exception petitioners conceded that the Tribunal's jurisdiction did not encompass their constitutional challenge but asserted that principles of collateral estoppel and *stare decisis* applied, relying on the Third Department's ruling in *Matter of Friedsam v State Tax Commn* (98 AD2d 26, *affd* 64 NY2d 76). The Tribunal affirmed the decision of the ALJ, agreeing that *Friedsam* was not dispositive.

Thereafter, petitioners commenced an article 78 proceeding. The Appellate Division converted the constitutional challenge into a declaratory judgment action and retained as an article 78 proceeding the remaining portion seeking annulment of the Tribunal's decision. While recognizing both that this Court had affirmed *Friedsam* solely on statutory grounds and that the statutory provisions in the two cases are different, the Appellate Division declared the statute violative of the Privileges and Immunities Clause. Respondent Commissioner appealed as of right (CPLR 5601[b][1]). We now reverse.

Statutory Scheme

Tax Law § 631(b)(6), enacted as part of the Tax Reform and Reduction Act of 1987 (L 1987, ch 28) (TRARA), specifies that

"the deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources."

New York source income of a nonresident is defined under Tax Law § 631(a) as:

"the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

"(1) his distributive share of partnership income, gain, loss and deduction * * *

"(2) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to * * *

"(B) a business, trade, profession or occupation carried on in this state * * *."

Beginning with the 1988 taxable year nonresidents' income from all sources is used in calculating their rate of New York tax. As we explained in *Brady v State of New York* (80 NY2d 596, 600, *cert denied* 509 US 905), under Tax Law § 601(e)(1) the tax of a nonresident is first calculated "as if [the taxpayer] were a resident," and the sum is then reduced by the percentage of income earned in New York compared to total income. While residents and nonresidents with the same total income are taxed at the same rate, the nonresident thus is taxed only on the percentage of income attributable to New York.

Consequently, Tax Law § 601(e)(1) provides:

"(1) There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident * * * a tax which shall be equal to the tax computed under subsections (a) through (d) of this section * * * as if such nonresident * * * were a resident, multiplied by a fraction, the numerator of which is such individual's * * * New York source income determined in accordance with Part III of this article [§ 631] and the denominator of which is such individual's * * * federal adjusted gross income for the taxable year."

The hypothetical "as if a resident" tax liability includes all deductions available to a resident, including a deduction for alimony payments. However, the numerator of the fraction (referred to as the "apportionment percentage")—the nonresident's New York source income—is not reduced by any nonbusiness deductions (including alimony payments). The denominator—the nonresident's Federal adjusted gross income—has under the Internal Revenue Code been reduced by any alimony payments (26 USC § 215).

Petitioners urge that Tax Law § 631(b)(6) is discriminatory because, without justification, it denies nonresidents the benefit of an alimony deduction from New York State tax liability. The Appellate Division agreed that the Privileges and

Immunities Clause was violated. We answer the question differently.

Analysis

We begin with the familiar proposition that statutes—the enactments of a co-equal branch of government—enjoy a presumption of constitutionality. Moreover, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." (*Austin v New Hampshire*, 420 US 656, 661-662 [citing *Madden v Kentucky*, 309 US 83, 88; *Lehnhausen v Lake Shore Auto Parts Co.*, 410 US 356].)

The Privileges and Immunities Clause, entitling the "Citizens of each State * * * to all Privileges and Immunities of Citizens in the several States," was intended to create a national economic union and establish a norm of comity between the States. The Clause in essence ensures that citizens of State A may do business in State B on terms of substantial equality with the citizens of that State. (See, *Supreme Court of New Hampshire v Piper*, 470 US 274, 279-280; *Toomer v Witsell*, 334 US 385, 396.)

In two seminal decisions on State income taxation of nonresidents under the Privileges and Immunities Clause—*Shaffer v Carter* (252 US 37) and *Travis v Yale and Towne Mfg Co* (252 US 60)—the Supreme Court established that limiting taxation of nonresidents to their in-State income was a sufficient justification for similarly limiting their deductions to expenses derived from sources producing that in-State income. Further, the Court made clear that in testing the constitutionality of a tax law, a court should put aside "theoretical distinctions" and look to "the practical effect and operation" of the scheme (*Shaffer v Carter*, 252 US at 56).

Thus, in *Shaffer* the Court upheld a provision of the Oklahoma income tax law that taxed nonresidents' income derived from local property and business and limited their deductions to losses related to these in-State activities, where Oklahoma also taxed all income of its own citizens. Similarly in *Travis*, the Court considered a New York statutory provision limiting

a nonresident's income tax deductions to such as "are connected with income arising from sources within the state" (*Travis*, 252 US at 73). In upholding the provision the Court noted that

"there is no unconstitutional discrimination against citizens of other States in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are connected with income arising from sources within the taxing State, likewise is settled by [*Shaffer*]."

(*Id.* at 75-76.) The *Travis* Court, however, considered an additional provision of the Tax Law that disallowed nonresidents any personal exemptions and found this an unreasonable discrimination because New York's proffered hope of reciprocity did not justify the statute's discriminatory effect (*id.* at 81-82).

More recently, the Supreme Court in *Austin v New Hampshire* (420 US 656) invalidated New Hampshire's commuters' income tax where it determined that "the tax falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone" (*id.* at 665). Indeed, the practical effect of the tax scheme in *Austin* was that New Hampshire taxed only the income of nonresidents working in the State, whereas its own residents paid no income tax whatever (*but see, Spencer v South Carolina Tax Commission*, 281 SC 492, 316 SE2d 386, *affd by an equally divided court*, 471 US 82 [reciprocity between States insufficient justification for disallowance of alimony deduction]).

As these cases illustrate, the Privileges and Immunities Clause does not mandate absolute equality in tax treatment. Rather, disparity in tax treatment between residents and nonresidents is permissible "in the many situations where there are perfectly valid independent reasons for it" (*Toomer v Witsell*, 334 US at 396). Therefore, the Clause is not violated where "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objec-

tive." (*Supreme Court of New Hampshire v Piper*, 470 US at 284.)

In this State, the propriety of disallowing deductions to nonresidents for personal expenses unrelated to New York income-producing sources was definitively addressed in *Matter of Goodwin v State Tax Comm* (286 App Div 694, *affd* 1 NY2d 680, *appeal dsmsd* 352 US 805). There, the petitioner, a lawyer residing in New Jersey and practicing in New York City, challenged New York's disallowance of deductions he claimed for his New Jersey real estate taxes, interest payments, medical expenses and life insurance premiums. In upholding the challenged disallowance, the Appellate Division gave three independently sufficient reasons to support the statute, two of which are particularly instructive here.

First, New York residents—unlike nonresidents—were subject to the burden of taxation on their worldwide income regardless of source and therefore were entitled to the offsetting benefit of full deductions (286 App Div at 696-698). Second, the court found it reasonable to disallow the deductions because they were personal expenses of the taxpayer and therefore "clearly a part of the petitioner's personal activities in his home State * * * If these expenditures are to be allowed as deductions at all, they should be allowed by the State of the taxpayer's residence" (*id.* at 701). Lastly, *Goodwin* justified the disparity on the basis that deductions for certain personal expenses reflected acceptable State policy "to give aid or encouragement of the character embodied in the tax deductions to its own residents" where the policies were linked to residence, and in such instances the State was not "constitutionally required to extend similar aid or encouragement to the residents of other States." (*Id.* at 702.)

After *Goodwin*, the Appellate Division in *Matter of Golden* (88 AD2d 1058) considered a Privileges and Immunities challenge to New York's policy of granting a moving expenses deduction to residents while denying it to nonresidents. Finding no justification for the disparate treatment the court, over the dissent of then-Justice Levine, struck down the statute. This Court affirmed the Appellate Division order but solely on the narrow ground that the Tax Commission in its answer

and bill of particulars had offered only nonresidence as the explanation for the disallowance (58 NY2d 1047, 1049). Manifestly, *Golden's* limited holding does not control the present case.

Nor does our affirmance in *Friedsam* undercut *Goodwin's* applicability here. In *Friedsam*, under facts similar to the present case, a Connecticut resident challenged New York's policy of disallowing alimony deductions from a nonresident's New York adjusted gross income. The Appellate Division, again over the dissent of then-Justice Levine, upheld the challenge concluding that there was no social policy justification for the disparate treatment. We affirmed, but only on statutory grounds. Pointing to former Tax Law § 635(c)(1)—which provided that “[t]he New York itemized deduction of a nonresident individual shall * * * be the same as for a resident individual”—we concluded the alimony disallowance was “contrary to statute and tax policy of this State.” (*Friedsam*, 64 NY2d at 81-82). As petitioner concedes, Tax Law § 631(b)(6), enacted some three years after *Friedsam*, had the effect of removing this impairment.

Now applying well-established principles to the facts before us, we conclude there is no violation of the Privileges and Immunities Clause. The disparate tax treatment of alimony paid by a nonresident is fully justified in light of the disparate treatment of income: nonresidents are taxed only on income earned in New York, while residents are taxed on all income earned from whatever sources. Focusing on the practical effect and operation of the challenged tax it is clear that the advantage granted residents is offset by the additional burden of being taxed on all sources of income. Indeed, unlike *Travis* and *Shaffer*, nonresidents are not denied all benefit of the alimony deduction since they can claim the full amount of such payments in computing the hypothetical tax liability “as if a resident” under Tax Law § 601(e).

Furthermore, the disallowance is substantially justified by the fact that petitioner's alimony payments are—not unlike the expenditures for life insurance, out-of-State property taxes and medical treatment at issue in *Goodwin*—wholly linked to personal activities outside the State. There is nothing to “war-

rant the petitioner's shifting the allowance for these expenditures, which are intimately connected with the State of his residence, to New York State.” (*Goodwin*, 286 App Div at 701.) Indeed, there can be no serious argument that petitioners' alimony deductions are legitimate business expenses. Thus, the approximate equality of tax treatment required by the Constitution is satisfied, and greater fine-tuning in this tax scheme is not constitutionally mandated.

Moreover, petitioners' argument that the silence of TRARA's legislative history as to the substantial reasons behind the treatment of nonresidents' alimony deductions somehow preordains its unconstitutionality is without merit. Where, as here, substantial reasons for the disparity in tax treatment are apparent on the face of the statutory scheme, absence of a statement at the time of enactment will not invalidate the statute.

Petitioners fare no better under the Equal Protection and Commerce Clauses. Nothing in the Fourteenth Amendment prevents the States from imposing unequal taxation on nonresidents, so long as the inequality is rationally related to the furtherance of a legitimate State interest (*see, Shaffer*, 252 US at 227-28; *Western & Southern Life Ins Co v State Board of Equalization*, 451 US 648, 667-68). Here, New York's treatment of alimony deductions is rationally related to its substantial policy of taxing only those gains realized and losses incurred by a nonresident in New York, while taxing residents on all income from whatever sources. Further, the challenged treatment is rationally related to its policy of limiting a nonresident's deductions to those attributable to income-producing activities in New York. Even if this matter concerning alimony payments were deemed to involve interstate commerce, petitioners' Commerce Clause claim would ultimately fail for the same reason.

Accordingly, the judgment of the Appellate Division should be reversed, with costs, the petition dismissed and judgment granted declaring Tax Law § 631(b)(6) constitutional.

* * *

10a

Judgment reversed, with costs, petition dismissed and judgment granted declaring Tax Law § 631(b)(6) constitutional. Opinion by Chief Judge Kaye. Judges Simons, Titone, Bellacosa, Smith, Levine and Ciparick concur.

Decided December 18, 1996

11a

APPENDIX B

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

No. 74021

Decided and Entered: March 14, 1996

In the Matter of CHRISTOPHER H. LUNDING et al.,

Petitioners,

—v—

TAX APPEALS TRIBUNAL OF
THE STATE OF NEW YORK, et al.,

Respondents.

Calendar Date: January 17, 1996

Before:

MIKOLL, J.P., MERCURE, YESAWICH JR.,
PETERS and SPAIN, JJ.

Cleary, Gottlieb, Steen & Hamilton (Christopher H. Lunding of counsel), New York City, petitioners in person.

Dennis C. Vacco, Attorney-General (Andrew Bing of counsel), Albany, for Commissioner of Taxation & Finance, respondent.

OPINION AND JUDGMENT

PETERS, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which sustained a personal income tax assessment imposed under Tax Law article 22.

Petitioner Christopher H. Lunding (hereinafter Lunding), a partner in a New York City law firm, derived substantial income in this State during 1990 from his practice of the legal profession. As Connecticut residents, petitioners timely filed a joint nonresident New York State personal income tax return.

Thereon, petitioners included \$108,000 of alimony reported to have been paid during the relevant time by Lunding to his former spouse, also a Connecticut resident. Concluding that 48.0868% of such alimony, equaling \$51,934, represented the amount of business income derived from or connected with this State, petitioners sought a deduction on their tax return for that portion of alimony. In March 1992, the Audit Division of the Department of Taxation and Finance (hereinafter the Division) disallowed the \$51,934 deduction and issued a notice of deficiency to petitioners on the basis of Tax Law § 631 (b) (6), which provides that nonresidents may not take the alimony deduction authorized by the Internal Revenue Code (*see*, 26 USC § 215). Hence, petitioners' tax liability was increased by \$3,724, plus interest.

Petitioners administratively appealed the determination, alleging that Tax Law § 631 (b) (6) violates the Privileges and Immunities Clause (US Const, art IV, § 2), the Equal Protection Clause (US Const 14th Amend) and the Commerce Clause (US Const, art I, § 8).¹ Thereafter, the Administrative Law Judge recognized that neither the Division nor the Tax

¹ Petitioners acknowledge that for the purpose of appeal, should Tax Law § 631 (b) (6) be found constitutional, they owe the disputed amount.

Appeals Tribunal has jurisdiction to determine whether a statute is unconstitutional on its face. Accordingly, it upheld the disallowance, as did the Tribunal. Petitioners then commenced this CPLR article 78 proceeding.

As a proceeding commenced pursuant to CPLR article 78 is not the proper vehicle to challenge the constitutionality of a statute (*see*, *Press v County of Monroe*, 50 NY2d 695, 702; *Matter of Ames Volkswagen v State Tax Commn.*, 47 NY2d 345, 348), we will convert that portion of the instant proceeding seeking such relief into a declaratory judgment action (*see*, CPLR 103[c]) and retain the remaining portion thereof as a proceeding commenced pursuant to CPLR article 78 since petitioners also seek annulment of the Commissioner's determination upholding the tax assessment (*compare*, *Matter of Ames Volkswagen v State Tax Commn.*, *supra*).

Addressing the challenge to Tax Law § 631 (b) (6) as being violative of the Privileges and Immunities Clause because only nonresident taxpayers are denied the alimony deduction (*see*, Tax Law § 631 [b] [6]), we follow our decision in *Matter of Friedsam v State Tax Commn.* (98 AD2d 26, *affd* 64 NY2d 76). Therein, we addressed whether Tax Law former § 632 violated the same constitutional provision by denying the nonresident petitioner, employed in New York and living in Connecticut, the income tax adjustment for alimony paid to his nonresident ex-spouse (*see, id.*). We recognized therein that although a disparity in treatment is permitted if valid reasons exist, the Privileges and Immunities Clause proscribes such conduct as discriminatory against nonresidents "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States" (*Matter of Golden v Tully*, 88 AD2d 1058, 1058, *affd* 58 NY2d 1047; *see, Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 28, *supra*). Rejecting the proffered reason that "alimony payments are purely personal in nature and not related to income producing activities in New York" (*Matter of Friedsam v State Tax Commn.*, *supra*, at 28) to justify the disparate treat-

ment, we found that the petitioner had been unconstitutionally denied the alimony deduction.²

The Court of Appeals affirmed our decision on statutory, not constitutional, grounds (*see, Matter of Friedsam v State Tax Commn.*, 64 NY2d 76, 79). Thereafter, the Legislature enacted the Tax Reform and Reduction Act of 1987 which, *inter alia*, added Tax Law § 631 (b) (6) (L 1987, ch 28, § 78) to address the Court of Appeals' concerns in *Matter of Friedsam v State Tax Commn.* (64 NY2d 76, *supra*) and provide express statutory authority to deny alimony deduction to non-residents.

We find that the addition of Tax Law § 631 (b) (6) to expressly authorize the denial of the alimony deduction to nonresidents does not alter or undermine our previous findings concerning the constitutionality of such practice (*see, Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 26-29, *supra*) or present a "compelling reason" to reach a different result on the identical legal issue (*see, Dufel v Green*, 198 AD2d 640, 640, *affd* 84 NY2d 795). Hence, mindful that "[o]nce this Court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision under the doctrine of stare decisis, which recognizes that legal questions, once resolved, should not be reexamined every time they are presented" (*id.* at 640), we find our constitutional analysis in *Matter of Friedsam v State Tax Commn.* (98 AD2d 26, *supra*) determinative of the issue now before us.

Our examination of the legislative history behind Tax Law § 631 (b) (6) reveals no stated reason or discussion addressing the rationale underlying a denial to only nonresidents of the alimony deduction authorized by the Internal Revenue Code (*see*, 26 USC § 215) in proportion with their New York income (*see*, L 1987, ch 28; Governor's Annual Message, 1987 NY Legis Ann, at 2-3; Governor's Mem 1987 NY Legis Ann, at 59; Mem of Senate Sponsor, 1987 NY Legis Ann, at

² The determination of the former State Tax Commission was therefore annulled (*Matter of Friedsam v State Tax Commn.*, *supra*, at 29).

58-59; *accord, Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 28, *supra*). Each of the reasons proffered by respondents were expressly addressed and rejected by us in *Matter of Friedsam v State Tax Commn.* (98 AD2d 26, 28-32, *supra*). Since Federal policy regarding the alimony deduction recognizes that tax consequences should rightly fall upon the recipients of the alimony, not the payors (*see*, 26 USC §§ 71, 215), and that pursuant to the statute before us the denial of the deduction to a nonresident taxpayer ignores, *inter alia*, where the recipient resides or whether the recipient is taxed by this State (*see, Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 29, *supra*), it becomes clear that there exists no substantial reason for the disparate treatment; leaving as "[t]he only criterion * * * whether the payor is a resident or nonresident. Without more, there results a constitutional violation * * *" (*Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 29, *supra*; *see, Toomer v Witsell*, 334 US 385; *Matter of Golden v Tully*, 88 AD2d 1058, *supra*).

Mikoll, J.P., Mercure, Yesawich Jr. and Spain, JJ., concur.

ADJUDGED that the proceeding is partially converted to an action for declaratory judgment, it is declared that Tax Law § 631 (b) (6) is unconstitutional, remainder of petition is granted, with costs, and determination of respondent Tax Appeals Tribunal is annulled.

ENTER:

Michael J. Novack
Clerk of the Court

APPENDIX C

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

DTA No. 810921

In the Matter of the Petition
of

CHRISTOPHER H. AND BARBARA J. LUNDING for Redeter-
mination of a Deficiency or for Refund of Personal
Income Tax under Article 22 of the Tax Law for the Year
1990.

DECISION

Petitioners Christopher H. and Barbara J. Lunding, 276 Otter Rock Drive, Greenwich, Connecticut 06830, filed an exception to the determination of the Administrative Law Judge issued on April 28, 1994. Petitioners appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief referring the Tax Appeals Tribunal to its brief filed before the Administrative Law Judge. This letter was received on August 26, 1994 and began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

Issues

I. Whether Tax Law § 631(b)(6) is unconstitutional under the Privileges and Immunities Clause, the Commerce Clause

and/or the Equal Protection Clause of the United States Constitution.

II. Whether the principles of stare decisis and collateral estoppel are properly applicable in this matter as to *Matter of Friedsam v. State Tax Commn.* (98 AD2d 26, 470 NYS2d 848, *affd* 64 NY2d 76, 484 NYS2d 807).

Findings of Fact

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Stipulated Facts

Pursuant to 20 NYCRR 3000.7, the parties stipulated and agreed that the following facts shall be taken as true for all purposes of this proceeding.

In 1990, petitioner Christopher H. Lunding derived substantial income in New York State from his practice of the legal profession in New York State as a partner in the law firm of Cleary, Gottlieb, Steen & Hamilton and worked at the office of that law firm located in the City and State of New York. New York was the principal source of earned income of petitioner Christopher H. Lunding in 1990.

Petitioners timely filed a joint Nonresident New York State Personal Income Tax Return on Form IT-203 for the year 1990 (the "1990 New York return").

Petitioners included \$108,000.00 of alimony reported to have been paid in 1990 by petitioner Christopher H. Lunding (the "alimony") on line 18 of the 1990 New York return as part of their total Federal adjustments to income and included 48.0868% of that alimony (\$51,934.00) in the "New York State Amount" on that line. Said 48.0868% was the percentage of the 1990 business income of petitioner Christopher H. Lunding reported in Form IT-203-A included in the 1990 New York return as having been derived from or connected with New York State sources.

The Division of Taxation ("Division") of the Department of Taxation and Finance denied this \$51,934.00 New York deduction and issued a Notice of Deficiency against petitioners on March 16, 1992, for the stated reason that Tax Law § 631(b)(6) provides that the deduction for alimony allowed by section 215 of the Internal Revenue Code of 1986 shall not constitute a deduction derived from New York sources for nonresident individuals.

The effect of this denial was to increase petitioners' alleged New York State personal income tax liability for 1990 (excluding interest) by \$3,724.00 (the "disputed amount") from the total New York State personal income tax liability shown by petitioners on the 1990 New York return as originally filed.

In the event that Tax Law § 631(b)(6) is a valid, constitutional statute (as the Division contends), petitioners owe the disputed amount. In the event that Tax Law § 631(b)(6) is unconstitutional (as petitioners contend), petitioners do not owe the disputed amount.

On June 10, 1992, petitioners duly filed a petition in the Division of Tax Appeals seeking a redetermination/revision of the above-referenced Notice of Deficiency. On August 28, 1992, the Division duly filed its answer to this petition.

Additional Facts

At all times since 1980, petitioner Christopher H. Lunding has been a resident of the State of Connecticut and has resided continuously At 276 Otter Rock Drive, Greenwich, Connecticut, approximately two miles from the New York State border.

On July 7, 1989, a judgment was entered in the Superior Court of the State of Connecticut, at Bridgeport, Connecticut, adjudging and declaring the marriage of petitioner Christopher H. Lunding to his then spouse to be dissolved, and ordering the parties to that action to comply with the Separation Agreement between them, dated May 31, 1989 (the "Separation Agreement"), which was incorporated by reference into that judgment.

The Separation Agreement requires petitioner Christopher H. Lunding to pay alimony to his former spouse in the annual amount of \$108,000.00, which alimony was in fact paid by Mr. Lunding in 1990. Mr. Lunding's former spouse was a resident of the State of Connecticut at all times in 1990.

On August 19, 1989, petitioner Christopher H. Lunding married petitioner Barbara J. Lunding at Greenwich, Connecticut. Since that date, petitioners have resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut.

Prior to the issuance of the Notice of Deficiency, the Division issued to petitioners a Statement of Proposed Audit Changes. The statement indicated that:

"A nonresident is not allowed the Federal deduction for alimony paid because it is not considered a deduction from income derived from New York sources. (Section 631[b][6] of the New York State Tax Law)."

The statement also provided a computation of tax due for the year 1990 based upon the disallowance of the deduction for alimony paid as follows:

"TAX PERIOD ENDED DATE:	12/31/90
TAX YEAR: 1990	FILE DUE DATE: 08/15/91
	DATE RECEIVED: 07/30/91
FILING STATUS: 02	
CORRECTED NEW YORK LINE 18:	\$17,741.00
CORRECTED NEW YORK LINE 19:	\$402,422.00
New York State Tax:	\$56,487.00
Income Percentage:	.5106
Allocated New York State Tax:	\$28,842.00
Tax Previously Stated/Adjusted:	\$25,118.00
Additional Tax Due:	\$3,724.00
Tax Per Taxpayer:	25,119.00
Tax Per Dept of Tax & Finance:	28,842.00
Timely Payments/Credits:	45,251.00
Late Payments:	0.00

Amount Previously Assessed/
 Refunded: 20,133.00—
 BALANCE: 3,724.00
 Tax Amount Assessed: 3,724.00"

Opinion

Tax Law § 631(a) provides that:

"[t]he New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . derived from or connected with New York sources"

Pursuant to section 215 of the Internal Revenue Code, alimony paid is a deductible expenditure when arriving at adjusted gross income (Internal Revenue Code § 215). However, for New York State income tax purposes, a nonresident is not allowed a deduction for alimony paid on his or her New York return pursuant to Tax Law § 631(b)(6). This provision was added by chapter 28 of the Laws of 1987.

Prior to the enactment of section 631(b)(6), in *Matter of Friedsam v. State Tax Commn.* (98 AD2d 26, 470 NYS2d 848, *affd* 64 NY2d 76, 484 NYS2d 807), the former State Tax Commission disallowed a deduction for alimony paid by a nonresident taxpayer on his New York nonresident return holding that alimony is not a deduction associated with the production of New York source income pursuant to Tax Law former § 632(b)(1)(B). Tax Law former § 632 provided as follows:

"(a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:

"(1) the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for

the taxable year, derived from or connected with New York sources

* * *

"(b) Income and deductions from New York sources.

"(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

* * *

"(B) a business, trade, profession or occupation carried on in this state."

Special Term, Albany County annulled the determination of the State Tax Commission holding that the disparate treatment accorded nonresidents seeking an alimony deduction as compared to residents was violative of the Privileges and Immunities Clause of the United States Constitution. The Appellate Division, Third Department affirmed Special Term holding that it was unconstitutional to deny the deduction based solely on the taxpayer's status as a nonresident (*Matter of Friedsam v. State Tax Commn.*, *supra*, 470 NYS2d 848, 850). The Appellate Division framed the issue as whether the application of section 632 by the State Tax Commission violated the constitution.

The Court of Appeals affirmed the Appellate Division on statutory grounds, not constitutional grounds. The Court of Appeals held that in disallowing the nonresident taxpayer's alimony deduction, the State Tax Commission "improperly applied [former] section 632 (subd. [a], par. [1]) of the Tax Law and failed to apply section 635 (subd. [c], par. [1]) of the Tax Law" (*Matter of Friedsam v. State Tax Commn.*, *supra*, 484 NYS2d 807, 810). The Court stated that

"[t]he passage of section 635 (subd. [c], par. [1]) reflected a policy decision 'that nonresidents be allowed the same non-business deductions as residents, but that

such deductions be allowed to nonresidents in the proportion of their New York income to income from all sources' " (*Matter of Friedsam v. State Tax Commn.*, *supra*, 484 NYS2d 807, 810 quoting Murphy and Petite, Taxation of Nonresidents by New York State, 12 Syracuse L. Rev. 147, 161-162).

The Administrative Law Judge held that at the administrative level statutes are presumed constitutional, so petitioners' assertion that Tax Law § 631(b)(6) is unconstitutional was not within the jurisdiction of the Division of Tax Appeals or the Tax Appeals Tribunal.

Next, the Administrative Law Judge held that the doctrines of collateral estoppel and stare decisis¹ were not applicable in this matter because the Division's disallowance of petitioners' alimony deduction on their nonresident return is premised on different authority than the former State Tax Commission's denial in *Matter of Friedsam v. State Tax Commn.* (*supra*). The Administrative Law Judge stated:

"requirements for application of the doctrine [of collateral estoppel] are: (1) that the issue as to which preclusion is sought be identical with that in the prior proceeding; (2) that the issue was necessarily decided in the prior proceeding; and (3) that the litigant who will be held precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding [citation omitted]" (Determination, conclusion of law "F").

The Administrative Law Judge held that there was no identity of issues since the disallowance of the alimony deduction in *Matter of Friedsam v. State Tax Commn.* (*supra*) was not premised on Tax Law § 631(b)(6) as it was not enacted until 1987. Thus, the doctrine of collateral estoppel was not applicable.

¹ The Administrative Law Judge stated that it was unnecessary to separately address petitioners' stare decisis argument because he deemed the two arguments interrelated.

On exception, petitioners concede that the Tax Appeals Tribunal's jurisdiction does not encompass challenges to the constitutionality of a statute on its face, but assert that as a matter of law the Appellate Division, Third Department has already ruled that it is unconstitutional to disallow an alimony deduction to a nonresident taxpayer. Petitioners contend that although the Court of Appeals decided *Matter of Friedsam v. State Tax Commn.* (*supra*) upon statutory grounds, the Third Department's decision in *Friedsam* was neither modified nor vacated by the Court of Appeals, so it is still binding precedent. Thus, petitioners assert that under principles of stare decisis and collateral estoppel, the Tax Appeals Tribunal is compelled to follow the Third Department's decision in *Matter of Friedsam v. State Tax Commn.* (*supra*).

We affirm the determination of the Administrative Law Judge.

The assertions made by petitioners concerning the applicability of the doctrine of collateral estoppel in this matter are the same as those made at hearing. The determination of the Administrative Law Judge dealt fully and correctly with this issue and we affirm for the reasons stated therein.

Next, because stare decisis is a much broader concept than collateral estoppel, we feel it is necessary to separately address whether *Matter of Friedsam v. State Tax Commn.* (*supra*) should be followed in the instant matter.

We find petitioners' reliance on *Matter of Friedsam v. State Tax Commn.* (*supra*), misplaced. The former State Tax Commission's denial of the nonresident taxpayer's alimony deduction in *Friedsam* was an application of the general definition of adjusted gross income of a nonresident individual contained in Tax Law former § 632. The Appellate Division found this application by the State Tax Commission to be unconstitutional. In petitioners' case, the denial was predicated on Tax Law § 631(b)(6) which, on its face, explicitly denies a nonresident an alimony deduction on his or her New York return. Although petitioners carefully craft their arguments in terms of a general issue, i.e., whether the disparate treatment accorded nonresident taxpayers as compared to resident taxpayers concerning the deductibility of alimony

payments on their New York returns is constitutional, *Friedman* established a principal of law that is not dispositive of the issue before us. Therefore, the doctrine of stare decisis does not require us to do indirectly that which cannot be done directly—declare Tax Law § 631(b)(6) unconstitutional on its face.

Accordingly, it is ORDERED, ADJUGED and DECREED that:

1. The exception of Christopher H. and Barbara J. Lunding is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Christopher H. and Barbara J. Lunding is denied.

DATED: Troy, New York
Feb 23 1995

/s/ JOHN P. DUGAN
John P. Dugan
President

/s/ FRANCIS R. KOENIG
Francis R. Koenig
Commissioner

APPENDIX D

STATE OF NEW YORK DIVISION OF TAX APPEALS

DTA NO. 810921

In the Matter of the Petition
of

CHRISTOPHER H. AND BARBARA J. LUNDING

for Redetermination of a Deficiency or for Refund
of Personal Income Tax under Article 22 of
the Tax Law for the Year 1990.

DETERMINATION

Petitioners, Christopher H. and Barbara J. Lunding, 276 Otter Rock Drive, Greenwich, Connecticut 06830, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1990.

On July 5, 1993 and July 19, 1993, respectively, petitioners, appearing *pro se*, and the Division of Taxation by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel) consented to have the instant controversy determined on submission without hearing. Documentary evidence was submitted by the Division of Taxation on June 15, 1992. Petitioners submitted documentary evidence and a brief on September 17, 1993. The Division of Taxation submitted a letter in lieu of a brief on October 12, 1993 and petitioners submitted a reply brief on November 5, 1993. After review of the entire record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether Tax Law § 631(b)(6) is unconstitutional under the Privileges and Immunities Clause, the Commerce Clause and/or the Equal Protection Clause of the United States Constitution.

II. Whether the principles of stare decisis and collateral estoppel as to the opinion of the Appellate Division, Third Department in the *Friedsam* case are properly applicable in this matter.

FINDINGS OF FACT

Stipulated Facts

Pursuant to 20 NYCRR 3000.7, the parties stipulated and agreed that the following facts shall be taken as true for all purposes of this proceeding.

1. In 1990, petitioner Christopher H. Lunding derived substantial income in New York State from his practice of the legal profession in New York State as a partner in the law firm of Cleary, Gottlieb, Steen & Hamilton and worked at the office of that law firm located in the City and State of New York. New York was the principal source of earned income of petitioner Christopher H. Lunding in 1990.

2. Petitioners timely filed a joint Nonresident New York State Personal Income Tax Return on Form IT-203 for the year 1990 (the "1990 New York return").

3. Petitioners included \$108,000.00 of alimony reported to have been paid in 1990 by petitioner Christopher H. Lunding (the "alimony") on line 18 of the 1990 New York return as part of their total Federal adjustments to income and included 48.0868% of that alimony (\$51,934.00) in the "New York State Amount" on that line. Said 48.0868% was the percentage of the 1990 business income of petitioner Christopher H. Lunding reported in Form IT-203-A included in the 1990 New

York return as having been derived from or connected with New York State sources.

4. The Division of Taxation ("Division") of the Department of Taxation and Finance denied this \$51,934.00 New York deduction and issued a Notice of Deficiency against petitioners on March 16, 1992, for the stated reason that Tax Law § 631(b)(6) provides that the deduction for alimony allowed by section 215 of the Internal Revenue Code of 1986 shall not constitute a deduction derived from New York sources for nonresident individuals.

5. The effect of this denial was to increase petitioners' alleged New York State personal income tax liability for 1990 (excluding interest) by \$3,724.00 (the "disputed amount") from the total New York State personal income tax liability shown by petitioners on the 1990 New York return as originally filed.

6. In the event that Tax Law § 631(b)(6) is a valid, constitutional statute (as the Division contends), petitioners owe the disputed amount. In the event that Tax Law § 631(b)(6) is unconstitutional (as petitioners contend), petitioners do not owe the disputed amount.

7. On June 10, 1992, petitioners duly filed a petition in the Division of Tax Appeals seeking a redetermination/revision of the above-referenced Notice of Deficiency. On August 28, 1992, the Division duly filed its answer to this petition.

Additional Facts

8. At all times since 1980, petitioner Christopher H. Lunding has been a resident of the State of Connecticut and has resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut, approximately two miles from the New York State border.

9. On July 7, 1989, a judgment was entered in the Superior Court of the State of Connecticut, at Bridgeport, Connecticut,

adjudging and declaring the marriage of petitioner Christopher H. Lunding to his then spouse to be dissolved, and ordering the parties to that action to comply with the Separation Agreement between them, dated May 31, 1989 (the "Separation Agreement"), which was incorporated by reference into that judgment.

10. The Separation Agreement requires petitioner Christopher H. Lunding to pay alimony to his former spouse in the annual amount of \$108,000.00, which alimony was in fact paid by Mr. Lunding in 1990. Mr. Lunding's former spouse was a resident of the State of Connecticut at all times in 1990.

11. On August 19, 1989, petitioner Christopher H. Lunding married petitioner Barbara J. Lunding at Greenwich, Connecticut. Since that date, petitioners have resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut.

12. Prior to the issuance of the Notice of Deficiency, the Division issued to petitioners a Statement of Proposed Audit Changes. The statement indicated that:

"A nonresident is not allowed the Federal deduction for alimony paid because it is not considered a deduction from income derived from New York sources. (Section 631(b)[6] of the New York State Tax Law)."

The statement also provided a computation of tax due for the year 1990 based upon the disallowance of the deduction for alimony paid as follows:

"TAX PERIOD ENDED DATE:	12/31/90
TAX YEAR: 1990	FILE DUE DATE: 08/15/91
	DATE RECEIVED: 07/30/91
FILING STATUS: 02	
CORRECTED NEW YORK LINE 18:	\$17,741.00
CORRECTED NEW YORK LINE 19:	\$402,422.00
New York State Tax:	\$56,487.00
Income Percentage:	.5106

Allocated New York State Tax:	\$28,842.00
Tax Previously Stated/Adjusted:	\$25,118.00
Additional Tax Due:	\$3,724.00
Tax Per Taxpayer:	25,119.00
Tax Per Dept of Tax & Finance:	28,842.00
Timely Payments/Credits:	45,251.00
Late Payments:	0.00
Amount Previously Assessed/	
Refunded:	20,133.00-
BALANCE:	3,724.00
Tax Amount Assessed:	3,724.00"

CONCLUSIONS OF LAW

A. Internal Revenue Code § 215(a) provides as follows:

"GENERAL RULE—In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year."

B. Tax Law § 631(a) provides that the New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his Federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources. Tax Law § 631(b)(6) provides that the deduction allowed by Internal Revenue Code § 215, relating to alimony, shall not constitute a deduction derived from New York sources. There is no such provision of the Tax Law which disallows the deduction of alimony applicable to residents of New York State.

C. The background of Tax Law § 631(b)(6) is important to the development of the matter at hand, starting with *Matter of Friedsam v. State Tax Commn.* (98 AD2d 26, 470 NYS2d 848, *affd* 64 NY2d 76, 484 NYS2d 807). Mr. Friedsam was a Connecticut resident employed in New York State,

who claimed alimony payments to his former wife (also a Connecticut resident) as an adjustment to income on his non-resident tax return. In computing his New York adjusted gross income, Mr. Friedsam modified his Federal adjusted gross income so as to take credit for alimony paid only in the same proportion as was represented by the New York portion of his salary. The Division disallowed the deduction ruling that it did not relate to the production of New York income. Following an appeal, the former State Tax Commission concluded that alimony is not a deduction attributable to the petitioner's profession carried on in this State, within the meaning of Tax Law former § 632(b)(1)(B) and, therefore, not a proper adjustment to income in computing the petitioner's New York adjusted gross income. Special Term, Albany County, granted the petitioner's Article 78 application and held that because a resident is allowed alimony paid as an adjustment against income while a nonresident is not, the difference in treatment, without a substantial reason, was violative of the Privileges and Immunities Clause of the United States Constitution (US Const, art IV, § 2, cl 1). In affirming the judgment of Special Term, the Appellate Division, Third Department held the Division's contention, that the disparate treatment of nonresidents was justified by the personal nature of the alimony deduction, to be without merit.

The New York Court of Appeals affirmed the order of the Appellate Division, but did so upon statutory, not constitutional, grounds. The Court of Appeals held that the Division's disparate tax classification between resident and nonresident taxpayers is contrary to statute and tax policy of New York State. Mr. Friedsam sought an alimony deduction proportional to the ratio of his New York income derived from all sources. The amount by which he reduced adjusted gross income for his alimony payment was commensurate with the income derived from New York sources, and was consistent with the reduction allowed to residents under similar circumstances. The Court of Appeals concluded that the Division, in disallowing Mr. Friedsam's alimony deduction, had improperly

applied Tax Law former § 632(a)(1) and failed to apply Tax Law former § 635(c)(1) (apportionment of nonresident's itemized deductions). According to the Court, the passage of Tax Law former § 635(c)(1) reflected a policy decision that nonresidents be allowed the same non-business deductions as residents, but that such deductions be allowed to nonresidents in the proportion of their New York income to income from all sources.

D. Tax Law § 631(b)(6) was enacted by the Legislature as part of the Tax Reform and Reduction Act of 1987 (L 1987, ch 28, § 78). The main purposes of the Act were to conform State tax law to the Federal reforms effected by the Federal Tax Reform Act of 1986; return the resulting windfall to New York taxpayers; simplify the calculation of State taxes for most taxpayers; and change the system of taxation of nonresidents and part-year residents. In addition, the Act specifically provided that the deduction for alimony allowed by the Internal Revenue Code shall not constitute a deduction derived from New York sources.

Under Tax Law § 601(e), a nonresident individual computes his New York taxable income by first determining what the tax due would be if he were a resident individual and then by multiplying the tax shown as due by a fraction whose numerator is his New York source income and whose denominator is his Federal adjusted gross income. In computing the tax as if a resident and computing his Federal adjusted gross income, the individual has deducted alimony payments made to his ex-spouse. However, he cannot deduct such payments in computing his New York source income numerator since, under Tax Law § 631(b)(6), alimony paid by a nonresident is not considered a deduction derived from New York sources. This section specifically reversed *Friedsam v. State Tax Commn.* (*supra*). The effect of the allowance of the deduction in the base and the denominator and disallowance in the numerator is that the taxpayer cannot get the benefit of a proportional deduction of the alimony payments made to his ex-spouse (*see*, TSB-A-90[3]-I).

E. Petitioners contend that the denial of alimony as a deduction by Tax Law § 631(b)(6) violates the Privileges and Immunities Clause, the Commerce Clause and the Equal Protection Clause of the United States Constitution. It has been recognized that the jurisdiction of the Tribunal and the Division of Tax Appeals is prescribed by the enabling legislation (*Matter of Fourth Day Enterprises*, Tax Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (*see, e.g., Matter of Unger*, Tax Appeals Tribunal March 24, 1994; *Matter of Bucherer, Inc.*, Tax Appeals Tribunal, June 28, 1990; *Matter of Fourth Day Enterprises*, *supra*; *cf., Matter of J. C. Penney Co.*, Tax Appeals Tribunal, April 27, 1989 [holding that the issue of the constitutionality of the Tax Law as applied was properly before the Tribunal]). Therefore, petitioners' arguments are rejected because the liability asserted herein is based on the statute cited above and it is presumed that the statute involved is constitutional (*Califano v. Sanders*, 430 US 99; *Matter of Fourth Day Enterprises*, *supra*).

F. Petitioners contend that the principles of collateral estoppel and stare decisis are applicable to this matter in relation to *Friedsam v. State Tax Commn.* (*supra*).

Collateral estoppel¹ is a doctrine which is a narrower form of res judicata. In essence, it precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 478 NYS2d 823; *see generally*, Siegel, NY Prac § 443, at 673 [2d ed]).

In *Capital Telephone Co. v. Pattersonville Telephone Co.* (56 NY2d 11, 451 NYS2d 11), the Court of Appeals held that collateral estoppel (or its more modern name "issue preclu-

¹ Since stare decisis is a policy of adherence to decided cases, which is what is sought by petitioners in their collateral estoppel defense, for purposes of this matter only the applicability of collateral estoppel shall be considered herein.

sion") applies to administrative as well as judicial proceedings. This is true as long as the determination of the administrative agency was rendered pursuant to the adjudicatory authority of the agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a court of law (*Staatsburg Water Co. v. Staatsburg Fire District*, 72 NY2d 147, 531 NYS2d 876). In either type of proceeding, requirements for application of the doctrine are: (1) that the issue as to which preclusion is sought be identical with that in the prior proceeding; (2) that the issue was necessarily decided in the prior proceeding; and (3) that the litigant who will be held precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding (*B. R. Dewitt, Inc. v. Hall*, 19 NY2d 141, 278 NYS2d 596). The courts have also held that the burden of establishing that the issue was identical and that the issue was necessarily decided in the prior proceeding is on the proponent of preclusion. As to the question of full and fair opportunity to contest the issue, the burden is on the party who opposes preclusion.

If the issue has not been litigated, there is no identity of issues between the present action and the prior determination (*Kaufman v. Lilly & Co.*, 65 NY2d 449, 492 NYS2d 584). For a question to have been actually litigated so as to satisfy the identity requirement, it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding (*Matter of Halyalkar v. Board of Regents*, 72 NY2d 261, 532 NYS2d 85; *Schwartz v. Public Admr. of County of Bronx*, 24 NY2d 65, 298 NYS2d 955; *Matter of Sterling Bancorp*, Tax Appeals Tribunal, November 18, 1993). In the instant case, petitioners challenge the validity of Tax Law § 631(b)(6). Clearly, the validity of Tax Law § 631(b)(6) was not actually litigated in the *Friedsam* case; thus, there is no identity of issue between the issue in the *Friedsam* case and the issue here.

In view of the fact that estoppel is an elastic doctrine, based on general notions of fairness involving a practical inquiry

into the realities of litigation (*Matter of Halyalkar v. Board of Regents, supra*), the principles of which are not to be applied in a mechanical fashion (*Staatsburg Water Co. v. Staatsburg Fire Dist., supra*) and that the use of the doctrine "offensively" by a nonparty in the prior litigation (here, petitioners) in some cases raises legitimate concerns about the fairness of its application (*Matter of Halyalkar v. Board of Regents, supra*), it is concluded that because the validity of Tax Law § 631(b)(6) was not challenged in the *Friedsam* case, the doctrine is not applicable in this case.

G. The petition of Christopher H. and Barbara J. Lunding is denied.

DATED: Troy, New York
APR 28 1994

/s/ THOMAS C. SACCA
ADMINISTRATIVE LAW JUDGE

IN THE

Supreme Court of the United States

October Term, 1996

CHRISTOPHER H. LUNDING, BARBARA J. LUNDING,

Petitioners,

-v.-

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

**BRIEF OF RESPONDENT COMMISSIONER OF TAXATION AND
FINANCE IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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181 Delaware Street, Walton, NY 13856—800-252-7181

(3082 - 1997)

Printed on Recycled Paper

20 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court should grant certiorari to review a decision of the New York Court of Appeals holding that New York's tax treatment of alimony paid by nonresidents (Tax Law § 631[b][6]) does not violate the Privileges and Immunities Clause of the United States Constitution because substantial reasons exist justifying New York's different tax treatment of alimony paid by residents and nonresidents, including (i) while residents are taxed on their worldwide income, nonresidents are taxed only on their income earned in New York, justifying New York's determination to limit nonresident deductions to those expenses incurred in connection with the production of the New York income, and (ii) alimony payments are intimately connected to the nonresident's personal activities outside New York and are thus allowable as a deduction, if at all, only by the state in which the nonresident taxpayer resides.

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IN THE
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October Term, 1996

CHRISTOPHER H. LUNDING,
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Petitioners,

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TAX APPEALS TRIBUNAL OF THE STATE OF NEW
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT COMMISSIONER OF TAXA-
TION AND FINANCE IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This proceeding involves New York State's personal income tax treatment of alimony paid by nonresidents. In 1989, petitioner Christopher H. Lunding was divorced from his spouse

(33)¹. A separation agreement requiring that he pay his former spouse \$108,000 in alimony during 1990 was incorporated into the judgment dissolving the marriage (33). Later in 1989, he married petitioner Barbara J. Lunding (33).

On their 1990 New York nonresident tax return, petitioners reported a federal adjusted gross income of \$788,210, including an adjustment² of \$108,000 for the full amount of alimony paid. They further reported a New York adjusted gross income of \$350,488. This sum included an adjustment of \$51,934, representing the \$108,000 in alimony multiplied by .480868, which was the percentage of Christopher Lunding's 1990 total business income which petitioners reported as derived from or connected with New York sources (20). Relying on New York Tax Law § 631(b)(6) (described below), respondent Commissioner of Taxation and Finance ("respondent") disallowed the alimony adjustment, increasing petitioners' New York source income by \$51,934 and their apportionment percentage (described below) from .444663 to .5106. Respondent issued a Notice of Deficiency against petitioners for the resulting tax deficiency of \$3,724, exclusive of interest (86-90).

Under New York's personal income tax, nonresidents of the State are liable for tax on only "[t]he net amount of items of

¹Parenthetical citations are to the Record on Appeal in the New York Court of Appeals. Parenthetical citations followed by "a" are to the appendix to the petition for certiorari.

²The Internal Revenue Code refers to alimony as a "deduction". 26 USC §§ 62(a)(10), 215(a). The New York Tax Law also refers to alimony as a deduction. N.Y. Tax Law § 631(b)(6) (McKinney 1987). Alimony and other deductions listed in 26 USC § 62 (defining adjusted gross income) were also called "adjustments to income" on the 1990 New York State nonresident income tax form filed by petitioners.

income, gain, loss and deduction * * * derived from or connected with New York sources." N.Y. Tax Law § 631(a) (McKinney 1987) ("Tax Law"). A nonresident calculates his New York income tax by first computing a hypothetical tax liability on his total income from all sources determined "as if [he] were a resident" and then multiplying the resulting tax liability "by a fraction, the numerator of which is [the nonresident's] New York source income * * * and the denominator of which is [the nonresident's] federal adjusted gross income for the taxable year." Tax Law § 601(e).³ This fraction is known as the apportionment percentage. For purposes of computing the numerator of the apportionment percentage, New York source income is not reduced by any nonbusiness deductions. Tax Law § 631(b)(1).

Under New York law, nonresidents include in the calculation of their tax "as if" they were residents all deductions available to New York residents, including the alimony deduction permitted by the Internal Revenue Code, 26 USC § 215. Accordingly, a nonresident is entitled to the benefit of the alimony deduction for purposes of computing the amount of his hypothetical tax liability determined "as if a resident". As to this component of the nonresident's tax computation, the nonresident and the resident are treated alike—both reduce gross income by the amount of alimony paid to determine adjusted gross income ("AGI").

³The quoted language is from Tax Law § 601(e) as in effect during 1990. N.Y. Tax Law § 601(e)(McKinney 1987). Section 601(e) was subsequently amended but the amendments did not substantially change the manner in which a nonresident's New York income tax is computed. N.Y. Tax Law § 601(e) (McKinney 1997 Supp).

However, the Tax Law provides that "[t]he deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." Tax Law § 631(b)(6). As a result of such provision, the numerator of the apportionment percentage is New York source income, with no reduction for alimony. Because the denominator of the apportionment percentage is federal AGI, from which alimony has been taken out (26 USC § 62[a][10]), the effect of Tax Law § 631(b)(6) is that the apportionment percentage is greater than it would be if the nonresident were allowed to reduce his New York source income by the amount of alimony paid. Thus, a greater portion of the hypothetical New York tax, determined "as if" the nonresident were in fact a New York resident, is payable as the nonresident's New York income tax liability.

On June 10, 1992, petitioners filed an administrative petition with the Division of Tax Appeals of the Department of Taxation and Finance, contending that Tax Law § 631(b)(6) violated the Privileges and Immunities, Equal Protection, and Commerce Clauses of the United States Constitution (81-90). Respondent duly answered (94-95), and the parties agreed to have the controversy determined without a hearing (80). On April 28, 1994, Administrative Law Judge Thomas C. Sacca (the "ALJ") issued a determination (25a-34a) concluding that the Division of Tax Appeals lacked jurisdiction over facial challenges to the constitutionality of a statute (32a) and denying the petition (34a).

Petitioners filed a notice of exception to the ALJ's determination with the Tax Appeals Tribunal ("the Tribunal") (12-18). They conceded that the Tribunal lacked jurisdiction over challenges to the facial constitutionality of a statute (9). On February 23, 1995, the Tribunal issued a decision affirming the

ALJ's determination (16a-24a). By notice of petition dated June 15, 1995, petitioners commenced the present proceeding challenging the Tribunal's decision pursuant to Tax Law § 2016 (97-109).

In its decision, the Appellate Division followed its earlier decision in *Matter of Friedsam v State Tax Commission*, 98 AD2d 26, 470 NYS2d 848 (3d Dept 1983), *aff'd on other grounds*, 64 NY2d 76, 473 NE2d 1181, 484 NYS2d 807 (1984), and declared that Tax Law § 631(b)(6) was unconstitutional because it violated the Privileges and Immunities Clause of the United States Constitution. 218 AD2d 268, 639 NYS2d 519 (3d Dept 1996) (11a-15a). Accordingly, the court annulled the decision of the Tax Appeals Tribunal (15a). The court did not address petitioners' Equal Protection and Commerce Clause arguments.

Respondent appealed the Appellate Division's decision to the New York Court of Appeals (125-126). In its decision, the Court of Appeals reversed the Appellate Division and held that Tax Law § 631(b)(6) was constitutional. 89 NY2d 283, 675 NE2d 816, 653 NYS2d 62 (1996)(1a-10a). The Court relied on this Court's decisions in *Shaffer v Carter*, 252 US 37 (1920), and *Travis v Yale & Towne Mfg. Co.*, 252 US 60 (1920), where, the Court observed, this Court "established that limiting taxation of nonresidents to their in-State income was a sufficient justification for similarly limiting their deductions to expenses derived from sources producing that in-State income" (5a). The Court acknowledged that a state could not tax the income of nonresidents working in the state while exempting its own residents from tax, *Austin v New Hampshire*, 420 US 656 (1975), nor deny to nonresidents the personal exemption available to residents, *Travis*, *supra* (6a). However, the Court noted that this Court's precedents permitted disparity in tax treatment of

residents and nonresidents "where there are perfectly valid independent reasons for it", *Toomer v Witsell*, 334 US 385, 396 (1948), and that the Privileges and Immunities Clause was not violated where there was a substantial reason for the difference in treatment and the discrimination practiced against nonresidents bore a substantial relationship to the state's objective. *Supreme Court of New Hampshire v Piper*, 470 US 274, 284 (1985) (6a-7a).

The Court found that two relevant substantial reasons justifying different tax treatment of personal nonbusiness expenses incurred by residents and nonresidents had been articulated in the decision of the Appellate Division in *Matter of Goodwin v State Tax Commission*, 286 App Div 694, 146 NYS2d 172 (3d Dept 1955), *aff'd*, 1 NY2d 680, 133 NE2d 711, 150 NYS2d 203 (1956), *appeal dismissed*, 352 US 805 (1956), upholding New York's disallowance of a nonresident's deductions for New Jersey real estate taxes, interest payments, medical expenses and life insurance premiums (7a). First, New York residents, unlike nonresidents, were subject to the burden of taxation on their worldwide income and therefore were entitled to the offsetting benefit of full deductions. Second, the disallowance was appropriate because the expenses were personal expenses of the taxpayer, which were not incurred in connection with the production of the New York income and which were clearly a part of his personal activities in his home state, where the deduction, if any, should be allowed (7a).

Based upon its analysis of the governing law, the Court held that Tax Law § 631(b)(6) did not violate the Privileges and Immunities Clause (8a). The Court found the *Goodwin* court's statement of the substantial reasons justifying the disallowance of nonresidents' personal deductions generally to be equally applicable to the treatment of alimony. The Court concluded

that the disparate tax treatment of alimony paid by nonresidents was fully justified in light of the disparate treatment of income: nonresidents are taxed only on income earned in New York, while residents are taxed on their worldwide income from all sources. According to the Court, the advantage granted residents regarding the alimony deduction is offset by the additional burden of being taxed on their worldwide income. The court noted that, unlike in *Travis* and *Shaffer*, nonresidents "are not denied all benefit of the alimony deduction since they can claim the full amount of such payments in computing the hypothetical tax liability 'as if a resident'" under Tax Law § 601(e)(8a).

The Court also concluded that the disallowance of the nonresident's alimony deduction is substantially justified by the fact that a nonresident's alimony payments are, like the property taxes on an out-of-state residence involved in *Goodwin*, wholly linked to personal activities outside New York having nothing to do with the generation of New York income (8a-9a). Accordingly, the court determined that the approximate equality of tax treatment required by the Constitution was satisfied, and greater fine tuning in New York's tax scheme was not constitutionally mandated (9a).

Finally, the Court determined that the absence of any legislative history regarding the substantial reasons justifying the tax treatment of nonresidents' alimony deductions did not undermine the validity of the statute (9a). The Court found that where, as here, "substantial reasons for the disparity in tax treatment are apparent on the face of the statutory scheme, absence of a statement at the time of enactment will not invalidate the statute" (9a).

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari in this proceeding should be denied because, *first*, the decision of the Court of Appeals of the State of New York does not conflict with any relevant decisions of this Court and, *second*, the federal question presented in the petition for a writ of certiorari is not an important federal question.

A. The Decision of the New York Court Of Appeals Does Not Conflict With Any Decision of This Court

After an exhaustive and scholarly review of this Court's Privileges and Immunities Clause jurisprudence regarding state personal income taxation, the New York Court of Appeals concluded that New York's income tax treatment of alimony paid by nonresidents does not violate the Privileges and Immunities Clause. This holding comports fully with *Shaffer* and *Travis* and with the cases that follow them. The supposed "clear conflict" with the relevant decisions of this Court, upon which the petition for certiorari is based in part, is simply nonexistent.

As the New York Court of Appeals recognized, this Court's leading precedents governing state income taxation of nonresidents are *Shaffer v Carter*, 252 US 37 (1920), and *Travis v Yale & Towne Mfg. Co.*, 252 US 60 (1920). In *Shaffer*, the taxpayer contended that Oklahoma violated the Privileges and Immunities Clause because it permitted residents to deduct losses wherever incurred but allowed nonresidents to deduct only losses incurred within the state. This Court rejected the contention, stating:

The difference, however, is only such as arises naturally from the extent of the jurisdiction of the State in the two classes of cases, and cannot be regarded as an unfriendly

or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the State, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to non-residents, the jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred.

252 US at 57.

Similarly, in *Travis*, decided with *Shaffer*, this Court considered the validity of various aspects of New York's income tax treatment of nonresidents, including a provision which allowed nonresidents deductions only if connected with income arising within New York. This Court found no constitutional impediment to New York's deduction limitation, stating:

[t]hat there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are connected with income arising from sources within the taxing state, likewise is settled by [*Shaffer*].

252 US at 75-76. Accordingly, the Court of Appeals correctly summarized the relevant holdings of *Shaffer* and *Travis* as establishing that limiting taxation of nonresidents to their in-state income is a sufficient justification for similarly limiting their deductions to expenses incurred in producing that in-state income.

Petitioners assert that the decision of the court below conflicts with another aspect of *Travis*, which did not address the denial of nonresidents' deductions for expenses incurred but instead invalidated New York's denial of personal exemptions to nonresident taxpayers. 252 US at 77-82. This Court found that the denial of the personal exemptions violated the Privileges and Immunities Clause, because whether the nonresident taxpayers "must pay a tax upon the first \$1,000 or \$2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference" for which this Court found no adequate justification. 252 US at 80.

Petitioner's assertion that the decision of the court below conflicts with this aspect of the *Travis* decision is misplaced. This Court saw no inconsistency in its holding validating New York's disallowance of nonresident deductions for expenses unrelated to New York income while at the same time striking down New York's disallowance of the nonresident personal exemptions. Deductions represent allowances for expenses actually paid or incurred, whereas personal exemptions immunize a portion of a taxpayer's income from liability solely on the basis of his personal status and without regard to any expenses he might have incurred. See, Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich L Rev 1309, 1343 (1974). Accordingly, the justification articulated by this Court in *Shaffer* and *Travis* for limiting a nonresident's deductions to those incurred to produce the in-state income subject to tax, and relied upon by the court below in sustaining the disallowance of petitioners' alimony deduction, did not justify the disallowance of the personal exemptions at issue in *Travis*. However, such justification clearly supported the decision of the court below. Contrary to petitioner's argument, this Court's reasoning in *Travis* invalidating New York's denial of the nonresident personal exemptions

is inapplicable here. Rather, as the court below found, the *Travis* holding relevant to this proceeding is the holding validating New York's denial to nonresidents of deductions for expenses not connected with the production of their New York income.

Similarly, the decision below does not conflict with this Court's decisions in *Ward v Maryland*, 79 US 418 (1870), and *Austin v New Hampshire*, 420 US 656 (1975). In *Ward*, this Court struck down a Maryland merchant licensing scheme that imposed substantially higher license fees on nonresident merchants than on those resident in the state. In *Austin*, this Court invalidated New Hampshire's commuter income tax which had the effect of taxing only the income of nonresidents working in New Hampshire. In *Austin*, this Court stated that the Privileges and Immunities Clause requires "substantial equality of treatment" between residents and nonresidents and noted that the burden on New Hampshire nonresidents was not offset even approximately by other taxes imposed on residents alone. 420 US at 665.

By contrast, in this proceeding, the court below determined that the advantage granted New York residents regarding the alimony deduction was offset by the additional burden of being taxed on their worldwide income (8a). This fact, and the fact that petitioners' alimony payments were personal expenditures completely unrelated to the generation of their New York source income, provided the substantial equality of tax treatment mandated by the Constitution.

B. The Question Presented Is Not an Important Federal Question

Petitioners assert that the question presented is an important federal question because of the number of taxpayers claiming the federal alimony deduction provided by 26 USC § 215 (Petr, 11). However, New York's income tax treatment of alimony paid by nonresidents is consistent with the approach adopted by the Internal Revenue Code, which completely denies the alimony deduction to nonresident aliens. 26 USC § 873(a) (deductions limited to those connected with income that is effectively connected with a US trade or business); 26 USC § 871(a)(1) (US-source income not effectively connected with a US trade or business is taxable at a flat rate with no deductions). Moreover, petitioners do not specify the number of taxpayers who would be eligible to claim an alimony deduction on nonresident state income tax returns filed in states limiting the deduction to residents only. Indeed, petitioners point to only one other decision of a state court of last resort involving the disallowance to nonresidents of the alimony deduction allowed to residents.

In *Wood v Department of Revenue*, 305 Or 23, 749 P2d 1169 (1988), the Supreme Court of Oregon held that Oregon's denial of the alimony deduction to nonresidents while allowing the deduction to residents violated the Privileges and Immunities Clause. Like the New York deduction disallowance upheld by this Court in *Travis*, the Oregon statute generally limited a nonresident's Oregon deductions to those incurred in connection with the Oregon-source income. 305 Or at 26, 749 P2d at 1170, n 3. The court analogized the denial of an alimony deduction to the denial of the personal exemptions that this Court invalidated in *Travis* and found no substantial reason for the different treatment. 305 Or at 31, 749 P2d at 1173. New York's tax

treatment of alimony is somewhat distinguishable from the Oregon statute at issue in *Wood* because, as the court below observed, New York nonresidents are not denied all benefit of the alimony deduction since they can claim the full amount of alimony payments in computing the hypothetical tax liability "as if a resident" to which the apportionment percentage is applied. Nevertheless, the holding of the court below is in conflict with the *Wood* decision.

Wood is the only decision of a state court of last resort cited by petitioners specifically involving alimony which directly conflicts with the decision below. The only other decision of a state court of last resort cited by petitioners, *Spencer v South Carolina Tax Commission*, 281 SC 492, 316 SE2d 386 (1984), *aff'd by an equally divided Court*, 471 US 82 (1985), does not involve alimony. In *Spencer*, the Supreme Court of South Carolina invalidated that State's disallowance all of a nonresident's nonbusiness deductions unless the state of the taxpayer's residence permitted similar deductions to its nonresidents. The *Spencer* decision did not analyze this Court's decisions in *Shaffer* and *Travis* in reaching its conclusion that the South Carolina statute violated the Privileges and Immunities Clause. This Court affirmed the South Carolina Supreme Court decision only on an unrelated issue regarding attorneys' fees. *Spencer v South Carolina Tax Commission*, 471 US 82 (1985), Petition for a Writ of Certiorari to the Supreme Court of South Carolina, at (I) ("Questions Presented").⁴

⁴Petitioners do not mention the decision of the Supreme Court of Nebraska in *Anderson v Tiemann*, 182 Neb 393, 155 NW2d 322 (1967), *appeal dismissed*, 390 US 714 (1968), upholding against a Privileges and Immunities Clause challenge that State's allowance of a food sales tax credit only to residents on the ground that food purchases for personal use are so closely

(continued...)

Accordingly, an issue that has been specifically considered by state courts of last resort only once previously in the history of the Republic, and that is presented in a case involving only \$3,724 in disputed tax, is not of sufficient importance to merit review by this Court.

⁴(...continued)

related to the state of residence that any credit should be allowed only by such state. Like *Spencer*, such decision did not specifically address alimony. However, the analysis of the Nebraska Supreme Court is consistent with that of the court below.

CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
April 14, 1997

Respectfully submitted,

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(3)
No. 96-1462

Supreme Court, U.S.

FILED

JUL 2 1997

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1996

CHRISTOPHER H. LUNDING, BARBARA J. LUNDING,

Petitioners,

—v.—

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,
COMMISSIONER OF TAXATION AND FINANCE OF THE
STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Did the court below err in holding that New York Tax Law Section 631(b)(6), which discriminates against nonresidents of New York who pay New York State income tax by expressly denying them entirely a tax deduction for alimony payments which New York residents are allowed fully to take, does not violate the Privileges and Immunities Clause (Article IV, Section 2) of the United States Constitution?

PARTIES TO THE PROCEEDING

Respondents the Tax Appeals Tribunal of the State of New York and the Commissioner of Taxation and Finance of the State of New York were the Respondents-Appellants below. Petitioners Christopher H. Lunding and Barbara J. Lunding were the Petitioners-Appellees below. -

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CHRISTOPHER H. LUNDING, BARBARA J. LUNDING,

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TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,
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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

The Petitioners respectfully submit this, their Brief, to this
Honorable Court.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York below, dated December 18, 1996, is reported at 89 N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62; App. 1a.¹ The opinion of the Appellate Division of the Supreme Court of the

¹ "App." refers to the appendices included with the Petition for a Writ of Certiorari, filed March 17, 1997. By Order of this Court dated June 23, 1997, a Joint Appendix has been dispensed with.

State of New York—Third Department below, dated March 14, 1996, is reported at 218 A.D.2d 268, 639 N.Y.S.2d 519 (3d Dep't 1996); App. 11a. The Decision of the Tax Appeals Tribunal of the State of New York below, dated February 23, 1995, is reproduced at App. 16a. The Determination of the Administrative Law Judge of the State of New York—Division of Tax Appeals below, dated April 28, 1994, is reproduced at App. 25a.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on December 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Petition for Writ of Certiorari was filed on March 17, 1997, and thus was timely under 28 U.S.C. § 2101(c). The Order granting the Writ of Certiorari was issued on May 19, 1997; and this Brief is filed within 45 days of that date.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case invokes the Privileges and Immunities Clause, U.S. Const. Article IV, Section 2, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The statute which Petitioners seek to have declared unconstitutional is Section 631(b)(6) of the New York Tax Law, which provides that "The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources."

STATEMENT OF THE CASE

Petitioners seek reversal of the judgment below of the Court of Appeals of the State of New York, which held that Section 631(b)(6) of the New York Tax Law ("Section 631(b)(6)") is not unconstitutional under the Privileges and Immunities Clause of the United States Constitution.

The procedural history of the case is summarized correctly in the opinion below of the Court of Appeals of the State of New York. Challenges to Section 631(b)(6) on federal constitutional grounds explicitly were raised by Petitioners at all administrative review levels of the proceedings below, as well as in all proceedings in the courts below. *See Lunding v. Tax Appeals Tribunal*, 89 N.Y.2d 283, 285-86, 675 N.E.2d 816, 817-18, 653 N.Y.S.2d 62, 63-64 (1996) ("Lunding II"), App. 2a; *Lunding v. Tax Appeals Tribunal*, 218 A.D.2d 268, 269-270, 639 N.Y.S.2d 519, 519-20 (3d Dep't 1996) ("Lunding I"), App. 12a; Determination of Administrative Law Judge in *In re Lunding*, DTA No. 810921 (Apr. 28, 1994) ("ALJ Determination") at 1, App. 26a. Indeed, it has been stipulated that if Section 631(b)(6) is constitutional, the Petitioners owe additional New York State personal income tax and if it is not, they do not. ALJ Determination at 3, Paragraph 6, App. 27a.

The relevant facts are quite simple, and are set out in the administrative determinations and court opinions below. In 1990, Petitioner Christopher H. Lunding was a partner in a New York City law firm and derived substantial income in New York from his law practice there. Petitioners were residents in that year of the State of Connecticut and timely filed a joint nonresident New York State personal income tax return. In 1990, Mr. Lunding paid \$108,000 of alimony to a former spouse; and Petitioners took a deduction on their 1990 New York nonresident personal income tax return for \$51,934, or 48.0868% of that alimony. This percentage represented the percentage of Petitioners' total 1990 personal income earned in New York. Petitioners' deduction for

alimony paid was denied solely on the basis of Section 631(b)(6), which provides that "[t]he deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." *Lunding II*, 89 N.Y.2d at 286, 675 N.E.2d at 818, 653 N.Y.S.2d at 64, App. 2a; ALJ Determination at 2-4, App. 26a-27a.

Because of the denial of this alimony deduction, Petitioners' personal income for New York purposes was increased by a like amount (\$51,934), resulting in the issuance to Petitioners of an assessment for additional 1990 New York State personal income tax in the amount of \$3,724, plus interest. *See Lunding II*, 89 N.Y.2d at 285, 675 N.E.2d at 818, 653 N.Y.S.2d at 64, App. 2a; ALJ Determination at 3, Paragraph 5, App. 27a. This assessment raised the total 1990 New York State personal income tax determined to be payable by Petitioners from \$25,118 to \$28,842, thus increasing Petitioners' 1990 New York State personal income tax liability by 14.8%. ALJ Determination at 4, App. 29a. It is not disputed that residents of New York State are allowed to deduct the entire amount of alimony paid in a given year in determining their taxable income for New York State personal income tax purposes. *Lunding I*, 218 A.D.2d at 270, 639 N.Y.S.2d at 520, App. 13a.

In order to appreciate fully the genesis and context of the matters raised here, it is necessary to understand the events which led to the passage of Section 631(b)(6), which was added to the New York Laws in 1987. It is indisputable that there is not one word of legislative history for this statute, *Lunding I*, 218 A.D.2d at 271, 639 N.Y.2d at 521, App. 14a. Indeed, until Petitioners commenced these proceedings, the only intended purpose for Section 631(b)(6) ever advanced by any instrumentality of the State of New York was in an advisory opinion of the New York State Tax Commissioner in *In re Rosenblatt*, [1989-1990 Transfer Binder] N.Y. St. Tax Rep. (CCH) ¶ 252-998, at 17,968 (Jan. 18, 1990), in which it was

declared that Section 631(b)(6) was intended "specifically [to] revers[e] *Friedson [sic] v. State Tax Commission*, 64 N.Y. 76 (1984)."

The case referred to is *Friedsam v. State Tax Commission*, 98 A.D.2d 26, 470 N.Y.S.2d 848 (3d Dep't 1983), *aff'd*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984). The facts there were strikingly similar to those in the case at hand. Mr. Friedsam was a Connecticut resident employed in New York and claimed alimony payments on his New York State personal income tax return in an amount proportionate to the relationship between his New York salary and his total income. Friedsam's deduction for alimony was disallowed by the New York tax authorities under then existing nonstatutory New York tax policies, and he sued to have that disallowance annulled and a judgment entered

"holding that because a [New York] resident is allowed alimony paid as an adjustment against income while a nonresident is not, the disparity in treatment without a substantial reason is violative of the privileges and immunities clause" 98 A.D.2d at 27, 470 N.Y.S.2d at 849.

In the *Friedsam* case, the Appellate Division of the Supreme Court of the State of New York—Third Department (the "Appellate Division") held that New York's disallowance of a deduction for alimony to nonresidents such as Mr. Friedsam violated the Privileges and Immunities Clause, noting that under the challenged New York tax policy

"it makes no difference where an alimony recipient lives, where the marriage and divorce took place, where the awarding divorce court was situated, or whether the recipient is taxed by New York. The only criterion is whether the payer [of alimony] is a resident or nonresident [of New York]. Without more, there results a con-

stitutional violation which we may not condone." 98 A.D.2d at 29, 470 N.Y.S.2d at 850.

On appeal, the New York Court of Appeals affirmed on statutory grounds alone, holding that the disallowance of Mr. Friedsam's proportionate deduction of alimony violated the "policy of substantial equality" established by the tax statutes of New York then in effect. 64 N.Y.2d at 81-82, 473 N.E.2d at 1184, 484 N.Y.S.2d at 810. Subsequently, Section 631(b)(6) was enacted to revoke this statutory "policy of substantial equality," which ultimately led to the proceedings here.

In the instant case, the Appellate Division followed its decision in *Friedsam* and unanimously held that Section 631(b)(6) is unconstitutional under the Privileges and Immunities Clause. *Lunding I*, 218 A.D.2d at 272, 639 N.Y.S.2d at 521, App. 15a. However, the New York Court of Appeals reversed and reinstated Section 631(b)(6), reasoning that this statute did not violate the Privileges and Immunities Clause, even though it imposed unequal taxation on nonresidents (which, indeed, evidently was its entire purpose and intended effect). The New York Court of Appeals rested this holding on two purported reasons. First, it stated that "[t]he disparate tax treatment of alimony paid by a nonresident is fully justified in light of the disparate treatment of income: nonresidents are taxed only on income earned in New York, while residents are taxed on all income earned from whatever sources." Second, it stated that "the disallowance [of a deduction to nonresidents for alimony paid] is substantially justified by the fact that petitioner's alimony payments are . . . wholly linked to personal activities outside the State [of New York]." 89 N.Y.2d at 290-91, 675 N.E.2d at 821, 653 N.Y.S.2d at 67, App. 8a. For the reasons set forth below, this reasoning is specious; and there is no precedential support for using such factors to turn away a challenge based on the Privileges and Immunities Clause to a State statute which plainly discriminates against nonresidents. Accordingly, Section 631(b)(6) should be declared unconstitutional.

SUMMARY OF ARGUMENT

Under settled precedents of this Court, once it is established that a statute discriminates against nonresidents, that statute is unconstitutional under the Privileges and Immunities Clause unless a substantial reason sufficient to sustain it is shown to exist. Here, Section 631(b)(6) plainly discriminates against nonresidents; and no valid or rational reason sufficient to sustain its constitutionality exists. Thus, Section 631(b)(6) should be declared and adjudged to be unconstitutional as violative of the Privileges and Immunities Clause of the United States Constitution.

ARGUMENT

A. Under Settled Precedents Of This Court, A Statute Which Discriminates Against Nonresidents May Be Sustained Only If It Is Justified By Substantial Reasons

Discriminatory taxation of nonresidents has been held to be unconstitutional under the Privileges and Immunities Clause at least since 1870, when this Court decided *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870). There, the Court held that the Privileges and Immunities Clause, among other things,

"plainly and unmistakably secures and protects the right of a citizen of one State . . . to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." 79 U.S. at 430.

Amplifying upon these rights, the Court stated that

"it should not be forgotten that the people of the several States live under one common Constitution, which was ordered to establish justice, and which, with the laws of Congress . . . is the supreme law of the land; and that the supreme law requires equality of burden, and forbids

discrimination in State taxation when the power is applied to the citizens of other States." 79 U.S. at 431.

Indeed, writing almost eighty years later, Justice Frankfurter observed that

"it is fair to summarize the decisions [of this Court] which have applied Art. IV, § 2, by saying that they bar a State from penalizing the citizens of other States by subjecting them to heavier taxation merely because they are such citizens" *Toomer v. Witsell*, 334 U.S. 385, 408 (1948) (concurring opinion).

Ward, which struck down a discriminatory tax on nonresident merchants, was followed by *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), which declared unconstitutional under the Privileges and Immunities Clause a New York statute that denied to nonresidents employed in New York a \$1,000 personal exemption from taxation of income which residents of New York enjoyed. In *Travis*, the Court noted that proper analysis should focus on "the concrete, the particular incidence" of the discriminatory tax and stated that the discrimination in issue there was

"not a case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . ; but a general rule, operating to the disadvantage of all non-residents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State"

and thus unconstitutional. *Travis*, 252 U.S. at 80-81 (citation omitted).

In more recent times, *Travis* was followed and cited with approval in *Austin v. New Hampshire*, 420 U.S. 656 (1975), a case which declared unconstitutional under the Privileges and Immunities Clause a New Hampshire statute which had the discriminatory effect of taxing nonresidents working in that State, when New Hampshire residents were not similarly

taxed. In *Austin*, the Court observed that in examining the validity of discriminatory taxation of nonresident individuals, its prior cases have reflected

"an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review *substantially more rigorous* than that applied to state tax distinctions among, say, forms of business organizations or different trades or professions . . .", 420 U.S. at 663 (emphasis supplied),

and have established "a *rule of substantial equality of treatment* for the citizens of the taxing State and nonresident taxpayers." *Id.* at 665 (emphasis supplied).

Turning from these generalities to the case at hand, *first*, there can be no question that Section 631(b)(6) was enacted for one reason and one reason only: To generate revenue at the expense of nonresident individuals by denying them any tax deduction for alimony payments, a deduction which is allowed without limit to New York residents. Obviously, this statute is a "general rule, operating to the disadvantage of all non-residents" who pay alimony. *Travis*, 252 U.S. at 81. Indeed, the situation here is as it was in *Ward v. Maryland*, in which this Court observed that

"Imposed as the exaction is upon persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court." 79 U.S. at 429.

Once such discrimination is demonstrated, under established precedents there must be shown to be a " 'substantial reason for the discrimination [against nonresidents] beyond the mere fact that they are citizens of other States.' " Such a reason would not exist "unless there is something to indicate that non-citizens constitute as particular source of the evil at which the [discriminatory] statute is aimed". Put differently, there must be a " 'reasonable relationship between the danger

represented by non-citizens, as a class, and the . . . discrimination practiced upon them.' " *Hicklin v. Orbeck*, 437 U.S. 518, 525-526 (1978) (quoting *Toomer v. Witsell*, 334 U.S. at 396, 399).

To demonstrate that such a substantial reason exists, "something more is required than bald assertion" *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952). As is demonstrated in Part B. below, here there is neither any evil, nor danger, nor legitimate reason whatsoever for the blatant discrimination practiced by this statute of the State of New York against non-residents. See *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988) (holding that Oregon's denial to non-residents of a deduction for alimony paid while residents were allowed to take such a deduction in computing their state income tax liability violated the Privileges and Immunities Clause); *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985) (holding that denial to nonresidents employed in South Carolina of nonbusiness deductions allowed for South Carolina residents in computing their South Carolina State income taxes violated the Privileges and Immunities Clause).

B. No Substantial Reason Exists For The Discrimination Against Nonresidents As A Class Practiced By Section 631(b)(6)

The New York Court of Appeals principally sought to rest its justification of the discrimination practiced against non-residents by Section 631(b)(6) on two alleged "reasons." The first of these was said to be that residents are taxed by New York on their entire income (no matter where earned) while nonresidents are taxed only on their income earned in New York. 89 N.Y.2d at 290, 675 N.E.2d at 821, 653 N.Y.S.2d at 67; App. 8a. However, it is evident that the distinction thus put forward has no relation to the discrimination practiced by Section 631(b)(6). This statute is purely discriminatory,

against all nonresident payers of alimony, and makes no distinction in the operation of this discrimination between those nonresidents who have only New York source income and those who have at least some income from other geographic sources.

Indeed, this same "reason" was put forward in *Travis* and rejected there by the Court, which stated that discrimination against nonresidents cannot be upheld

"upon the theory that non-residents have untaxed income derived from sources in their home States or elsewhere outside of the State of New York The discrimination is not conditioned upon the existence of such untaxed income; and it would be rash to assume that non-residents taxable in New York under this law, as a class, are receiving additional income from outside sources equivalent to the amount of the exemptions that are accorded to citizens of New York and denied to them." 252 U.S. at 81.

The second "reason" put forward below and said to justify the discrimination practiced by Section 631(b)(6) was that "petitioner's alimony payments are . . . wholly linked to personal activities outside the State [of New York]." 89 N.Y.2d at 291, 675 N.E.2d at 821, 653 N.Y.S.2d at 67; App. 8a. About this "reason," as a prefatory matter one may observe that the facts in the record do not support this conclusion. More fundamentally, it may be observed, again, that Section 631(b)(6) does not condition its denial to all nonresidents of a deduction for alimony paid in reference to any "personal activities" outside of New York, no matter to what those activities are—or are not—"linked." Rather, Section 631(b)(6) denies a deduction on the basis of one factor only: nonresidence. This statute makes no distinction in its application between nonresidents who were married and divorced in New York or whose sole source of personal income is in New York and other nonresidents who were married or divorced else-

where or whose personal income was generated from more than one State.

In any event, it is quite incorrect to say that the obligation of petitioner Christopher H. Lunding to pay alimony in 1990 was "wholly linked" to his activities outside New York. There is nothing about the obligation to pay alimony which is uniquely related to one's State of residence. *See generally*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309, 1348-1349 (1974). Rather, in this case (as is commonplace) the obligation to pay alimony is mandated by a final judgment of a State court of competent jurisdiction (reproduced in full in the Record on Appeal in the New York Court of Appeals below at R. 40-R. 41) which is entitled to full faith and credit (U.S. Const. art. IV, § 1), and thus is enforceable in New York and in every other State of the United States without regard to where Petitioners reside. *Cf. Shaffer v. Carter*, 252 U.S. 37, 55-57 (1920), in which it was stated that the State of Oklahoma was not constitutionally required to allow a nonresident owner of Oklahoma oil and gas leases and oil producing property to take a deduction against his Oklahoma investment income for business losses incurred elsewhere (no such losses in any event having been shown in the record of that case to have been sustained), the question of whether or not Oklahoma constitutionally must allow a deduction against such Oklahoma investment income for an allocated portion of the value of management services rendered elsewhere (but apparently not specifically tied to a particular geographic location) expressly being reserved for future consideration.

Finally, the New York Court of Appeals sought to distinguish *Travis* and *Shaffer* by stating "nonresidents are not denied [in computing their New York personal income tax] all benefit of the alimony deduction" 89 N.Y.2d at 291, 675 N.E.2d at 821, 653 N.Y.S.2d at 67, App. 8a. This statement is misconceived in reference to nonresidents as a class.

The New York system for determining the personal income tax liability of nonresidents is complex and (in its tax rates) progressive. First, "New York takes into account both New York and non-New York source income in calculating the tax rate to be applied to the New York income." *Brady v. State of New York*, 80 N.Y.2d 596, 600, 607 N.E.2d 1060, 1061, 592 N.Y.S.2d 955, 956, *cert. denied*, 509 U.S. 905 (1992). Then, the nonresident's New York personal income tax liability is computed "as if a resident." As was correctly explained below

"The hypothetical 'as if a resident' tax liability includes all deductions available to a resident, including a deduction for alimony payments. However, the numerator of the fraction (referred to as the 'apportionment percentage')—the nonresident's New York source income—is not reduced by any nonbusiness deductions (including alimony payments). The denominator—the nonresident's Federal adjusted gross income—has under the Internal Revenue Code been reduced by any alimony payments (26 U.S.C. § 215)." 89 N.Y.2d at 287, 675 N.E.2d at 819, 653 N.Y.S.2d at 65, App. 4a.

As the final step, a nonresident taxpayer's actual New York personal income tax liability is determined by multiplying his or her "as if a resident" tax liability by this "apportionment percentage." It is incorrect to state that the result of these calculations ineluctably provides a benefit to nonresidents of New York who pay alimony. A simple hypothetical example will demonstrate this. Assume a nonresident whose sole source of personal income is annual wages of \$100,000, all earned in New York; assume further that this person pays alimony of \$20,000 in a given year and has no other deductions. On these facts, the numerator for calculating the New York "apportionment percentage" would be \$100,000 and the denominator \$80,000 (because for federal purposes alimony is an adjustment which reduces taxable income while, for New York purposes, for nonresidents it is not), which results in a New York "apportionment percentage"—and thus a New

York personal income tax liability for this hypothetical non-resident—of 100/80, or 125%, of what a New York resident with the same income and alimony obligation would be required to pay.²

In short, there is no "reason" or rationale for Section 631(b)(6) except the obvious one: a desire to take the easy path of increasing revenue by imposing discriminatory taxes on nonresidents, who cannot vote in New York and thus have no voice in its legislative processes. If the decision of the New York Court of Appeals here is allowed to stand, States may take encouragement in denying to nonresident wage earners all deductions extended to resident taxpayers, resulting in a serious erosion of the principles of federalism and freedom of employment which the Privileges and Immunities Clause is intended to protect. This plainly is unconstitutional, and the judgment below of the Court of Appeals of New York should be reversed.

² The exact financial impact of this discrimination on any particular nonresident taxpayer of course varies according to the portion of that taxpayer's total income which is New York sourced and the relationship of the amount of alimony paid to that total income. However, the result always will discriminate against nonresidents by increasing their New York State personal income tax liability above that which it would have been absent the existence of Section 631(b)(6), as obviously was the case here.

CONCLUSION

For the foregoing reasons, the judgment below of the Court of Appeals of New York should be reversed, and Section 631(b)(6) of the New York Tax Law declared to be unconstitutional and in conflict with the Privileges and Immunities Clause (Article IV, Section 2) of the Constitution of the United States.

Dated: July 2, 1997

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AUG 1 1997

CLERK

IN THE

Supreme Court of the United States

October Term, 1996

CHRISTOPHER H. LUNDING, BARBARA J. LUNDING,

Petitioners,

-v.-

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,
COMMISSIONER OF TAXATION AND FINANCE OF THE
STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

**BRIEF OF RESPONDENT
COMMISSIONER OF TAXATION AND FINANCE**

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(3426 - 1997)

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York's income tax treatment of alimony paid by petitioners, who were New York nonresidents, was consistent with the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution where substantial reasons existed justifying New York's different tax treatment of alimony paid by residents and nonresidents, to wit (i) New York residents were taxed on their income from all sources, while petitioners as nonresidents were taxed only on their income earned in New York, and their payments of alimony were not connected with the production of their New York income, and (ii) the alimony payments were intimately connected to petitioners' personal and family activities outside New York.

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No. 96-1462

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996**

CHRISTOPHER H. LUNDING,
BARBARA J. LUNDING,

Petitioners,

-v.-

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,
COMMISSIONER OF TAXATION AND FINANCE OF THE
STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF THE STATE OF NEW YORK

**BRIEF OF RESPONDENT COMMISSIONER
OF TAXATION AND FINANCE**

STATEMENT OF THE CASE

This case involves New York State's personal income tax treatment of alimony paid by nonresidents. In 1989, petitioner

Christopher H. Lunding was divorced from his wife (18a)¹. A separation agreement requiring that he pay his former wife \$108,000 in alimony during 1990 was incorporated into the judgment dissolving the marriage (18a-19a). Later in 1989, he married petitioner Barbara J. Lunding (19a).

During 1990, petitioners resided in Connecticut (18a). Petitioner Christopher H. Lunding was a New York-based partner in a law firm partnership with offices in New York City and other cities in the United States and abroad (17a). On their 1990 New York nonresident tax return, petitioners reported a federal adjusted gross income of \$788,210, including an adjustment² of \$108,000 for the full amount of alimony paid (2a). They further reported a New York adjusted gross income of \$350,488 (19a). This sum included an adjustment of \$51,934, representing the \$108,000 in alimony multiplied by .480868, which was the percentage of Christopher Lunding's 1990 total business income which petitioners reported as derived from or connected with New York sources (17a). Relying on New York Tax Law § 631(b)(6) (McKinney 1987) ("Tax Law"), respondent Com-

¹Parenthetical citations consisting of a number are to pages in the Record on Appeal in the New York Court of Appeals. Parenthetical citations consisting of a number followed by "a" are to pages in the appendices to the petition for certiorari. A Joint Appendix has been dispensed with by order of this Court dated June 23, 1997.

²The Internal Revenue Code refers to alimony as a "deduction." 26 U.S.C. §§ 62(a)(10), 215(a). The New York Tax Law also refers to alimony as a deduction. N.Y. Tax Law § 631(b)(6) (McKinney 1987). Alimony and other deductions listed in 26 U.S.C. § 62 (defining adjusted gross income) were also called "adjustments to income" on the 1990 New York State nonresident income tax form filed by petitioners.

missioner of Taxation and Finance ("respondent") disallowed the alimony adjustment, increasing petitioners' New York source income by \$51,934 (18a). Respondent issued a Notice of Deficiency against petitioners for the resulting tax deficiency of \$3,724, exclusive of interest (18a).

Under New York's personal income tax, New York residents are taxed on their income from New York and non-New York sources³ but nonresidents are liable for tax on only "[t]he net amount of items of income, gain, loss and deduction * * * derived from or connected with New York sources." Tax Law § 631(a). The Tax Law provides that "[t]he deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." Tax Law § 631(b)(6).⁴

³Tax Law § 601(a), (b) and (c) imposes a tax on the New York taxable income of New York residents. Tax Law § 611(a) defines the New York taxable income of a resident by reference to his New York adjusted gross income, which Tax Law § 612(a) defines by reference to the resident's federal adjusted gross income. The Internal Revenue Code defines adjusted gross income for federal income tax purposes by reference to gross income, which includes income "from whatever source derived." 26 U.S.C. §§ 62(a), 61(a).

⁴New York's personal income tax treatment of nonresidents' alimony has varied between the time the deduction entered the Tax Law in 1943 and the enactment of the present scheme in 1987. See N.Y. Laws of 1943, c. 245, § 3 (alimony deduction allowed only if recipient subject to New York taxation, with the Department of Taxation and Finance construing the deduction as available only to residents, Letter of Rollin Browne, Commissioner of Taxation and Finance, to Governor Dewey, dated March 9, 1944, pp 1-2 [Governor's Bill Jacket, N.Y. Laws of 1944, c. 333]); N.Y. Laws of 1944, c. 333, § 2 (alimony deduction allowed to residents without regard to whether recipient is taxable in

On June 10, 1992, petitioners filed an administrative petition with the Division of Tax Appeals of the New York Department of Taxation and Finance, contending that Tax Law § 631(b)(6) violated the Privileges and Immunities, Equal Protection, and Commerce Clauses of the United States Constitution (25a-26a). Respondent duly answered (94-95), and the parties agreed to have the controversy determined without a hearing (25a). On April 28, 1994, the administrative law judge (the "ALJ") issued a determination (25a-34a) concluding that the Division of Tax Appeals lacked jurisdiction over facial challenges to the constitutionality of a statute (32a) and denying the petition (34a).

Petitioners filed a notice of exception to the ALJ's determination with the Tax Appeals Tribunal ("the Tribunal") (16a). They conceded that the Tribunal lacked jurisdiction over challenges to the facial constitutionality of a statute (23a). On February 23, 1995, the Tribunal issued a decision affirming the ALJ's determination (16a-24a). By notice of petition dated June 15, 1995, petitioners commenced the present proceeding before the New York Supreme Court, Appellate Division, Third Depart-

New York and to nonresidents only if recipient is taxable in New York); N.Y. Laws of 1961, c. 68, § 1 (itemized deductions, then including alimony, generally allowed to nonresidents in proportion to the part of their total income derived from New York sources). See also *Matter of Friedsam v. State Tax Commission*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984) (nonresidents allowed proportional alimony deduction under pre-1987 law); see generally J. Murphy and A. Petite, *Taxation of Nonresidents by New York State*, 12 Syr. L. Rev. 147, 152 (1960); M. Solomon, *Nonresident Personal Income Tax: A Comparative Study in Eight States*, 29 Fordham L. Rev. 105, 118 (1960); Nonresident Tax Study Committee, *Report on Taxation of Nonresidents by New York State* (1959).

ment, challenging the Tribunal's decision pursuant to Tax Law § 2016 (97-109).⁵

In its decision, the Appellate Division followed its earlier decision in *Matter of Friedsam v. State Tax Commission*, 98 A.D.2d 26, 470 N.Y.S.2d 848 (3d Dept. 1983), *aff'd on other grounds*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984), and declared that Tax Law § 631(b)(6) was unconstitutional because it violated the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution. 218 A.D.2d 268, 639 N.Y.S.2d 519 (3d Dept. 1996) (11a-15a). Accordingly, the court annulled the decision of the Tax Appeals Tribunal (15a). The court did not address petitioners' Equal Protection and Commerce Clause arguments.

Respondent appealed the Appellate Division's decision to the New York Court of Appeals (125-126). In its decision, the Court of Appeals reversed the Appellate Division and held that Tax Law § 631(b)(6) was constitutional. 89 N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62 (1996)(1a-10a). The Court relied on this Court's decisions in *Shaffer v. Carter*, 252 U.S. 37 (1920), and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), where, the Court observed, this Court "established that limiting taxation of nonresidents to their in-State income was a sufficient justification for similarly limiting their deductions to

⁵Tax Law § 2016 provides that the Tax Appeals Tribunal and the Commissioner of Taxation and Finance must be designated as respondents in the proceeding for judicial review of the Tribunal's decision, but that the Tribunal shall not participate in such proceeding. Accordingly, respondent Tax Appeals Tribunal of the State of New York has not participated in this proceeding and will not file a brief or otherwise participate in the proceeding in this Court.

expenses derived from sources producing that in-State income" (5a). The Court acknowledged that a state could not tax the income of nonresidents working in the state while exempting its own residents from tax, *Austin v. New Hampshire*, 420 U.S. 656 (1975), nor deny to nonresidents the personal exemptions available to residents. *Travis, supra* (6a). However, the Court noted that this Court's precedents permitted disparity in tax treatment of residents and nonresidents "where there are perfectly valid independent reasons for it," *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), and that the Privileges and Immunities Clause was not violated where there was a substantial reason for the difference in treatment and the discrimination practiced against nonresidents bore a substantial relationship to the state's objective. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (6a-7a).

The Court found that two relevant substantial reasons justifying different tax treatment of personal nonbusiness expenses incurred by residents and nonresidents had been articulated in the decision of the Appellate Division in *Matter of Goodwin v. State Tax Commission*, 286 App. Div. 694, 146 N.Y.S.2d 172 (3d Dept. 1955), *aff'd*, 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203 (1956), *appeal dismissed for want of a substantial federal question*, 352 U.S. 805 (1956), upholding New York's disallowance of a nonresident's deductions for New Jersey real estate taxes, interest payments, medical expenses and life insurance premiums (7a). First, New York residents, unlike nonresidents, were subject to the burden of taxation on their worldwide income and, therefore, were entitled to the offsetting benefit of full deductions. Second, the disallowance was appropriate because the expenses were personal expenses of the taxpayer, which were not incurred in connection with the production of the New York income and which were

clearly a part of his personal activities in his home state, where the deduction, if any, should be allowed (7a).

Based upon its analysis of the governing law, the Court held that Tax Law § 631(b)(6) did not violate the Privileges and Immunities Clause (8a). The Court found the *Goodwin* court's statement of the substantial reasons justifying the disallowance of nonresidents' personal deductions generally to be equally applicable to the treatment of alimony. The Court concluded that the disparate tax treatment of alimony paid by a nonresident was fully justified in light of the disparate treatment of income: nonresidents are taxed only on income earned in New York, while residents are taxed on their income from all sources. The Court viewed the advantage granted residents regarding the alimony deduction as offset by the additional burden of being taxed on their worldwide income (8a).

The Court also concluded that the disallowance of the nonresidents' alimony deduction is substantially justified by the fact that a nonresident's alimony payments are, like the property taxes on an out-of-state residence involved in *Goodwin*, wholly linked to personal activities outside New York having nothing to do with the generation of New York income (8a-9a). Accordingly, the Court determined that the approximate equality of tax treatment required by the Constitution was satisfied, and greater fine tuning in New York's tax scheme was not constitutionally mandated (9a).

Finally, the Court determined that the absence of any legislative history regarding the substantial reasons justifying the tax treatment of nonresidents' alimony deductions did not undermine the validity of the statute (9a). The Court found that where, as here, "substantial reasons for the disparity in tax treatment are

apparent on the face of the statutory scheme, absence of a statement at the time of enactment will not invalidate the statute" (9a).

SUMMARY OF ARGUMENT

New York's personal income tax treatment of petitioners' alimony payments does not violate the Privileges and Immunities Clause because such treatment is substantially related to substantial governmental reasons. First, the disparate tax treatment of alimony paid by a nonresident is justified in light of the disparate treatment of income. Under long-established precedents of this Court, a state may limit the nonresident's expenses, losses and other deductions to those incurred in connection with the production of income within the state because the state may tax a nonresident only on the portion of his income attributable to the state. In contrast, a resident is subject to tax on income from all sources. Additionally, New York may validly deny the alimony deduction to a nonresident while allowing it to New York residents, because a nonresident's alimony payments are personal expenses related to the nonresident's life in his home state which has nothing to do with New York. New York is not obligated to make personal deductions such as alimony available to a nonresident in calculating his New York source income. Given these several justifications, the substantial equality of treatment required by the Privileges and Immunities Clause is satisfied.

ARGUMENT

A. Nonresidents are Taxable in New York on Only Their New York Source Income, and New York is Substantially Justified in Denying Nonresidents a Deduction for Alimony Because Alimony is Not an Expense Incurred in Connection With the Production of the New York Source Income.

This Court has long recognized that the Privileges and Immunities Clause of Article IV, § 2, of the United States Constitution⁶ safeguards the right of a resident of one state to pursue his livelihood in another state on terms of substantial equality with residents of the other state. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (state law requiring a nonresident's shrimp boat to pay a license fee 100 times greater than that paid by resident violated the Privileges and Immunities Clause); *Ward v. Maryland*, 79 U.S. 418, 430 (1870) (state merchant licensing scheme that imposed substantially higher license fees on nonresident merchants than on those residing in the state violated Privileges and Immunities Clause). Such right generally includes the right to be exempt from any higher taxes than are imposed by the other state on its own citizens. *Ward v. Maryland, supra.*⁷ See *Austin v. New Hampshire*, 420 U.S. 656 (1975) (holding

⁶"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

⁷This Court has concluded that for purposes of analyzing a state taxing scheme under the Privileges and Immunities Clause, the terms "citizen" and "resident" are essentially interchangeable. *Austin v. New Hampshire*, 420 U.S. 656, 662, n. 8 (1975); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78-79 (1920).

that New Hampshire's commuter income tax violated the Privileges and Immunities Clause where the state imposed a tax on nonresidents' New Hampshire-derived income in excess of \$2,000, but effectively imposed no tax on the earned income of New Hampshire residents).

However, this Court has repeatedly recognized that the Privileges and Immunities Clause does not mandate absolute equality of treatment of residents and nonresidents for state income tax purposes where legitimate reasons exist justifying different treatment. Rather, "substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers" is required. *Austin v. New Hampshire*, *supra*, 420 U.S. at 665. It is enough "that the State has secured a reasonably fair distribution of burdens," *Travelers' Insurance Company v. Connecticut*, 185 US 364, 371 (1902), considering the "practical effect and operation of the respective taxes as levied." *Shaffer v. Carter*, 252 U.S. 37, 56 (1920). The Privileges and Immunities Clause thus does not preclude:

disparity of treatment in the many situations where there are perfectly valid independent reasons for it. . . . [T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Toomer v. Witsell, *supra*, 334 U.S. at 396 (footnote omitted). In other words, disparity in treatment between residents and nonresidents does not violate the Privileges and Immunities

Clause where (i) there is a substantial reason for the difference in treatment, and (ii) the discrimination practiced against nonresidents bears a substantial relationship to that reason. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 67 (1988) (the Privileges and Immunities Clause requires that the degree of discrimination bear a close relation to the state's substantial reasons).

As the New York Court of Appeals found, the difference between New York's income tax treatment of alimony paid by residents and nonresidents is based on the difference between residence tax jurisdiction and source tax jurisdiction -- a difference recognized by this Court, the United States and most other taxing jurisdictions. *See* M. McIntyre and R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause*, 13 *State Tax Notes* 245, 246 (July 28, 1997). A state's jurisdiction over its residents is plenary, and a state may tax the income of a state resident from all sources, wherever earned, without offending the Constitution (residence taxation). *People of the State of New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312-313 (1937); *Lawrence v. State Tax Commission*, 286 U.S. 276, 279 (1932); *Shaffer v. Carter*, 252 U.S. 37, 57 (1920). As stated in *Lawrence*:

The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the

state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government.

286 U.S. at 279. The state's relationship with a nonresident is on a substantially different footing. Consequently, the state's income tax jurisdiction is much more limited, generally encompassing income derived from in-state sources (source taxation). *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U.S. 435, 441-442 (1944); *Shaffer v. Carter*, *supra*.

In *Shaffer v. Carter*, this Court was presented with an Illinois resident who in 1916 derived income in excess of \$1,500,000 from his Oklahoma oil business on which Oklahoma assessed an income tax in excess of \$76,000. The taxpayer contended, among other things, that the Oklahoma levy violated the Privileges and Immunities Clause because it permitted residents to deduct losses wherever incurred but allowed nonresidents to deduct only losses incurred within Oklahoma. The Court rejected the contention, stating that the different treatment of nonresidents regarding losses not related to their Oklahoma source income was justified:

The difference, however, is only such as arises naturally from the extent of the jurisdiction of the State in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the State, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to non-residents, the jurisdiction extends

only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred.

252 U.S. 37, 57.

Similarly, in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), decided with *Shaffer*, this Court considered the validity of various aspects of New York's income tax treatment of nonresidents, including a provision which allowed nonresidents to claim deductions available to residents only if connected with income arising within New York. The deductions limited by such provision included deductions for trade or business or other profit-seeking expenses as well as for personal expenses such as charitable contributions and non-business interest, taxes, bad debts and casualty losses. Former New York Tax Law § 360(11) (McKinney 1920 Supp). This Court found no constitutional impediment to New York's nonresident deduction limitation, stating:

[t]hat there is no unconstitutional discrimination against citizens of other States in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are connected with income arising from sources within the taxing State, likewise is settled by [*Shaffer*].

252 U.S. at 75-76.

The New York Court of Appeals correctly summarized the relevant holdings of *Shaffer* and *Travis* as establishing that

limiting taxation of nonresidents to their in-state income is a sufficient justification for similarly limiting their deductions, including non-business deductions, to expenses incurred in producing that in-state income. 89 N.Y.2d at 288, 675 N.E.2d at 819, 653 N.Y.S.2d at 65. As stated by two leading commentators in the field of state taxation, "Shaffer and Travis support a State's refusal to allow a nonresident a proportionate share of the various personal deductions allowed residents." J. Hellerstein and W. Hellerstein, *State Taxation - II Sales and Use, Personal Income, and Death and Gift Taxes*, ¶ 20.06(2)(c), p. 20-38 (1992) (footnotes omitted).

New York's rationale for disallowing nonresidents any personal deductions was succinctly stated in 1959 in testimony before the House Judiciary Committee by New York's then Commissioner of Taxation and Finance:

Since legally we do not and cannot recognize the existence of this [non-New York source] income, we have felt that, in general, we cannot recognize these other deductions which, in the main, are of a personal nature and are unconnected with the production of income in New York.

Statement of Hon. Joseph H. Murphy, Commissioner of Taxation and Finance and President, New York State Tax Commission, Hearing Before Subcommittee No. 2, Committee on Judiciary, House of Representatives, on H.J. Res. 33, *et al.* and H.R. 4174, *et al.*, Taxation of Income of Nonresidents, 86th Cong., 1st Sess., 98-99 (1959). More recently, two scholars who played a leading role in developing New York's 1987 plan for reform of family taxation have noted that New York's tax treatment of alimony is consistent with New York's taxation of

families generally. According to those commentators, alimony achieves the same result as marital income splitting (*i.e.*, taxing income to the person who enjoys its economic benefits), which New York allows only to residents. Extending the benefit of income splitting to nonresidents is inappropriate on tax policy grounds because nonresidents are taxed by New York on only a slice of their income—that derived from New York sources. M. McIntyre and R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause*, *supra*, 13 State Tax Notes at 249-250; *see generally* M. McIntyre, *Tax Justice For Family Members After New York State Tax Reform*, 51 Alb. L. Rev. 789 (1987).

In summary dismissals decided after *Shaffer and Travis*, this Court has accommodated state distinctions between residents and nonresidents for income tax purposes based on the state's ability to tax the nonresident on only his in-state income. *See* J. Hellerstein and W. Hellerstein, *State Taxation-II Sales and Use, Personal Income and Death and Gift Taxes*, ¶ 20.06[3], p. 20-47 (1992). Thus, for example, in *Matter of Goodwin v. State Tax Commission*, 286 App. Div. 694, 146 N.Y.S.2d 172 (3d Dept. 1955), *aff'd*, 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203 (1956), *appeal dismissed for want of a substantial federal question*, 352 U.S. 805 (1956),⁸ the taxpayer, a resident

⁸This Court has repeatedly stated that its "summary dismissals are . . . to be taken as rulings on the merits . . . in the sense that they rejected the 'specific challenges presented in the statement of jurisdiction' and left 'undisturbed the judgment appealed from.'" *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 476-477 n. 20 (1979) (citation omitted), quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *See R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 139, n. 7 (1986); *see also*

of New Jersey who practiced law in New York City, was denied deductions for real estate taxes on his New Jersey home, interest on the home mortgage, medical expenses and life insurance premiums. The denial was based on former Tax Law § 360(11) (McKinney 1954), which provision this Court had upheld in *Travis*. New York disallowed these deductions to the *Goodwin* taxpayer because they were not connected with the taxpayer's New York source income. The taxpayer contended that former New York Tax Law § 360(11) discriminated against nonresidents in violation of the Privileges and Immunities Clause. The New York Appellate Division, Third Department, upheld the provision, relying on *Shaffer* and *Travis*. 286 App. Div. at 696-698, 146 N.Y.S.2d at 176-178. The Court of Appeals affirmed the decision without opinion, 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203 (1956), and this Court dismissed the taxpayer's appeal from the Court of Appeals for want of a substantial federal question.

Likewise, in *Davis v. Franchise Tax Board*, 71 Cal. App. 3d 998, 139 Cal. Rptr. 797 (Ct. App. 3d Dist. 1977), *appeal dismissed for want of a substantial federal question*, 434 U.S. 1055 (1978), this Court dismissed an appeal from a decision of the California Court of Appeal upholding that state's denial of

Hicks v. Miranda, 422 U.S. 332, 343-345 (1975) (lower courts bound by this Court's summary decisions). While this Court has stated that "[t]hey do not . . . have the same precedential value . . . as does an opinion of this Court after briefing and oral arguments on the merits," a summary dismissal does represent a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. *Yakima Indian Nation, supra*, 439 U.S. at 476-477 n. 20; see *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974).

income averaging to nonresidents. At the time, California's income tax rates applied only to the nonresidents' California source income, thus ignoring out-of-state income in determining the nonresidents' tax bracket. Income averaging was intended to reduce the hardship caused by fluctuations in income and the resulting variations in the applicable tax bracket. 71 Cal. App. 3d at 1001, 139 Cal. Rptr. at 798. The California court found that, under California's tax scheme, a nonresident could show a fluctuating California income even though his total income from all sources did not vary from year to year. The court found that a nonresident's use of income averaging could thus enable the nonresident to utilize a tax bracket that did not necessarily reflect his overall ability to pay. 71 Cal. App. 3d at 1003, 139 Cal. Rptr. at 799. Accordingly, the structure of California's general income tax treatment of nonresidents provided a substantial reason, independent of the mere fact of nonresidency, for denying income averaging to nonresidents.⁹

Other state courts have concluded that limitations on a state's tax jurisdiction over nonresidents justify differences in the tax treatment of residents and nonresidents. In *Taylor v. Conta*, 106 Wis. 2d 321, 316 N.W.2d 814 (1982), the Supreme Court of

⁹This Court's affirmance by an equally divided Court of the decision of the Supreme Court of South Carolina in *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided Court*, 471 U.S. 82 (1985), a case relied upon by petitioners (Pet. Br., p. 10), was limited to the issue of attorney's fees under 42 U.S.C. § 1988 and did not address the holding of the Supreme Court of South Carolina that such state's denial of non-business deductions to nonresidents in the absence of reciprocity violated the Privileges and Immunities Clause. See *Petition for a Writ of Certiorari to Supreme Court of South Carolina*, at 1 ("Questions Presented").

Wisconsin upheld Wisconsin's denial of a moving expense deduction for expenses incurred in commencing employment outside the state. The court, relying on *Shaffer* and *Travis*, held that since Wisconsin did not tax income earned by former residents in their new state of residence, Wisconsin was not constitutionally required to allow deductions for expenses incurred to generate income that was beyond its taxing jurisdiction. 106 Wis. 2d at 352, 316 N.W.2d at 830.¹⁰

The Wisconsin court also upheld the constitutionality of that state's denial of a tax deferral on gain realized on the sale of a Wisconsin residence where the replacement residence purchased by the taxpayer was located outside Wisconsin. Former Wisconsin residents contended that such provision violated the Privileges and Immunities Clause. The court identified two justifications for the denial of the tax deferral when the new residence was located outside the state: unless the state taxed the former residents immediately, they would escape all Wisconsin tax on the gain while those continuing to reside in Wisconsin could ultimately be taxable, and forcing the state to keep track of former residents until the deferred gain was recognized was administratively burdensome. By denying the tax deferral to the former resident, the court found that Wisconsin treated the resident and the former resident "as fairly as possible within our

¹⁰See also *Harris v. Commissioner of Revenue*, 257 N.W.2d 568 (Minn. 1977) (upholding disallowance of moving expense deduction); but cf. *Matter of Golden v. Tully*, 58 N.Y.2d 1047, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983) (invalidating disallowance of nonresident moving expense deduction where no justification other than nonresidence was proffered).

federal system." *Taylor v. Conta*, 106 Wis. 2d at 346, 316 N.W.2d at 827.¹¹

Similarly, in *Maland v. Commissioner of Revenue*, 331 N.W.2d 486 (Minn. 1983), the Supreme Court of Minnesota upheld against a Privileges and Immunities Clause challenge an estate tax marital exemption limited to property passing to the surviving spouse of a decedent domiciled in Minnesota at the time of his death. The court found that the different treatment of resident and nonresident decedents was justified because the resident's taxable estate included tangible and intangible property located anywhere while the nonresident decedent's estate included only tangible property located in Minnesota. The court noted that as a result, because of the state's graduated estate tax, a nonresident was likely to be taxed at a lower rate than a resident on assets of equal value. The court stated that denying the marital exemption was an attempt to compensate for this difference, and was sufficiently closely related to such objective to pass muster under the Privileges and Immunities Clause. 331 N.W.2d at 489.

Moreover, although the Privileges and Immunities Clause does not apply to the United States, it is worth noting that New York's income tax policy regarding alimony paid by nonresidents is entirely consistent with federal tax law, which completely denies the alimony deduction to nonresident aliens, regardless of the residence of the recipient. See 26 U.S.C.

¹¹But see *Kuhnen v. Musolf*, 143 Wis. 2d 134, 420 N.W.2d 401 (Ct. App. 1988), review denied, 143 Wis. 2d 910, 422 N.W.2d 860 (1988), where an intermediate appellate court came to a different conclusion regarding the gain deferral issue based on a different record.

§ 873(a) (deductions limited to those connected with income that is effectively connected with a U.S. trade or business); 26 U.S.C. § 871(a)(1) (U.S. source income not effectively connected with a U.S. trade or business is taxable at a flat rate with no deductions). Additionally, permitting the taxing jurisdiction that is the source of the income to disregard nonbusiness deductions of nonresidents is allowed under well-settled norms of international taxation. See M. McIntyre and R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause*, *supra*, 13 State Tax Notes at 247-249. Accordingly, the legitimacy of differing tax treatment of residents and nonresidents based upon the state's inability to tax nonresidents on their non-state source income is well established.¹²

¹²California and West Virginia also do not allow nonresident taxpayers to reduce state source income by alimony paid. Cal. Rev. and Tax. Code § 17302 (1988 and 1996 Supp); W. Va. Code Ann. § 11-21-32(b)(4) (1995). Additionally, Alabama limits the alimony deduction to residents and Wisconsin requires nonresidents to add back alimony paid to their federal adjusted gross income for state tax purposes. Ala. Code § 40-18-15(18) (1993 and 1996 Supp); Wis. Stat. Ann. § 71.05(6)(a) (West 1989 and 1996 Supp). Illinois and Ohio apparently do not allocate alimony deductions to in-state sources. Ill. Comp. Stat. Ann. c. 35, § 5/301(c)(2)(A) (Smith-Hurd 1996 and 1997 Supp); Ohio Rev. Code Ann. § 5747.20(B)(6) (Page 1996). Pennsylvania does not allow residents or nonresidents to deduct alimony. Pa. Stat. Ann. §§ 3402-307, 3402-308 (Purdon 1995 and 1997 Supp). A few states allow nonresidents to deduct alimony in proportion to the part of their income derived from in-state sources. See, e.g., Ga. Code Ann. § 48-7-30(d)(2) (Michie 1995 and 1996 Supp); La. Rev. Stat. Ann. tit. 47, §§ 59, 243(B), 244(A) (West 1990 and 1997 Supp); Or. Rev. Stat. § 316.130(2)(c)(A) (1995 and 1996 Supp). A number of states tax nonresidents on their state-source income but do not

Petitioners rely heavily (Pet. Br., pp. 8-9, 11) on another portion of this Court's opinion in *Travis v. Yale & Towne Mfg. Co.*, *supra*, striking down New York's denial of personal exemptions to nonresidents, 252 U.S. at 77-82. In the case of residents, New York exempted from taxation \$1,000 of income in the case of a single person and \$2,000 in the case of a married person, and \$200 for each additional dependent. A nonresident taxpayer had no similar personal exemptions. 252 U.S. at 79. This Court found that denying personal exemptions to nonresidents while allowing them to residents violated the Privileges and Immunities Clause, because whether the nonresident taxpayers "must pay a tax upon the first \$1,000 or \$2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference" for which there was no adequate justification. 252 U.S. at 80.

Petitioners' reliance on this aspect of *Travis* is misplaced. The personal exemptions at issue in *Travis* are essentially different from the alimony deduction at issue in the present case. As the

explicitly allocate alimony deductions to in-state or out-of-state sources. See, e.g., Colo. Rev. Stat. § 39-22-109 (1994 and 1996 Supp); Conn. Gen. Stat. Ann. §§ 12-700(b), 12-711 (West 1993 and 1997 Supp); Del. Code Ann. tit. 30, §§ 1121, 1124 (Michie 1985 and 1996 Supp); Ind. Stat. Ann. §§ 6-3-2-1, 6-3-2-2, 6-3-2-2.2 (Burns 1995 and 1996 Supp); Iowa Code Ann. §§ 422.5(1)(j), 422.8 (West 1990 and 1997 Supp); Mo. Ann. Stat. §§ 143.041, 143.081 (Vernon 1996 and 1997 Supp); Okla. Stat. Ann. tit. 68, §§ 2355, 2362 (West 1992 and 1977 Supp); Utah Code Ann. §§ 59-10-116, 59-10-117 (Michie 1996). Alaska, Florida, Nevada, South Dakota, Texas, Washington (State) and Wyoming have no personal income tax, and New Hampshire and Tennessee do not tax earned income. N.H. Rev. Stat. Ann. § 77-4 (1991 and 1996 Supp); Tenn. Code Ann. § 67-2-102 (Michie 1994 and 1996 Supp).

New York Appellate Division recognized in *Goodwin, supra*, 286 App. Div. at 702-703, 146 N.Y.S.2d at 181, personal exemptions are allowed as a flat amount, without regard to the making of expenditures of any kind by the taxpayer. Personal exemptions immunize a portion of the taxpayer's income from liability solely on the basis of his personal status. See W. Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309, 1343 (1974). Personal exemptions affect the rate structure by creating a zero bracket amount equal to the amount of the exemption. Because New York could not directly tax nonresidents at a higher rate than residents having the same income, this Court in *Travis* found that it could not do so indirectly through the simple expedient of denying personal exemptions to nonresidents. See M. McIntyre and R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under The Privileges and Immunities Clause, supra*, 13 State Tax Notes at 252, n. 52.

On the other hand, deductions, such as the alimony deduction at issue in the present case, represent allowances for expenses actually paid or incurred by the taxpayer, which are allowable for a variety of different policy reasons. The alimony deduction at issue here is not equivalent to a personal exemption and does not affect New York's income tax rate structure because it is not an allowance in a flat amount available to all residents without regard to their expenses. Accordingly, the personal exemptions at issue in *Travis* are not analogous to the alimony deduction at issue in this case.

This Court saw no inconsistency in *Travis* in upholding New York's disallowance of nonresident deductions for income-producing and personal expenses unrelated to New York income while at the same time striking down New York's disallowance

of the nonresident personal exemptions. Contrary to petitioners' argument, this Court's reasoning in *Travis* invalidating New York's denial of the nonresident personal exemptions is inapplicable here. Rather, as the court below found, the *Travis* holding relevant to this case is the holding validating New York's denial to nonresidents of deductions for expenses not connected with the production of their New York income.

Petitioners further contend that the invalidity of New York's statutory scheme is demonstrated by a hypothetical example in which a nonresident paying alimony is more heavily taxed than a New York resident. Unlike the present case, the hypothetical case posits a nonresident taxpayer paying alimony whose total income consists of New York source wages. The operation of Tax Law § 631(b)(6) results in the hypothetical nonresident's tax liability exceeding that of a comparable New York resident (Pet. Br., pp. 13-14). Petitioners' hypothetical example emphasizes that only in such a case would New York residents be favored, because only then would the nonresidents be more heavily taxed than similarly situated residents with the same income and expenses. Such difference in treatment is permitted by *Shaffer* and *Travis* where the nonresident's disallowed expenses are not incurred in connection with the production of the in-state income.

In any event, the hypothetical case is not this case. Here, Mr. Lunding derived approximately half of his income from New York sources. Petitioners paid only about 51 percent of the tax that would have been due from a resident married couple with the same income and expenses (28a). Thus, petitioners were more favorably treated than comparable New York residents. See M. McIntyre and R. Pomp, *State Income Tax*

Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause, supra, 13 State Tax Notes at 252-253.

Finally, contrary to petitioners' argument (Pet. Br., p. 11), the holding of the court below was not premised upon the assumption or speculation that petitioners had untaxed income in some other state justifying discriminatory treatment in New York. Instead, the Court of Appeals, following *Shaffer* and *Travis*, held that New York was substantially justified in denying petitioners' alimony deduction for purposes of computing their New York source income because alimony was not an expense incurred in connection with the production of their New York source income. New York's justification does not depend on the existence of any untaxed non-New York income. Because it is undisputed that the alimony payments at issue in this case were not incurred in connection with the production of petitioners' New York source income, New York was entirely justified in disregarding them.

B. New York May Validly Deny the Alimony Deduction to a Nonresident Because a Nonresident's Alimony Payments are Personal Expenses Related to the Nonresident's Life in His Home State Over Which New York Has No Jurisdiction and Which New York Should Not Be Required to Consider.

In the present case, the New York Court of Appeals also concluded that Tax Law § 631(b)(6) validly precluded petitioners from deducting alimony in computing their New York source income based on its view that alimony is a personal expense which is not incurred in connection with the production of New York source income but which is wholly linked to personal activities outside New York. The Court noted that, in this

respect, the alimony payments were like the expenditures for life insurance, out-of-state real property taxes and medical treatment involved in *Goodwin* (8a).

Unlike residents, over whom New York has complete and plenary tax jurisdiction, the nonresident who simply works in New York presents to New York only the employment aspect of his life. New York need not concern itself with the fact that the nonresident has a personal life in another state, and should not be required to take account of the nonresident's personal expenses having nothing to do with the generation of his New York income. New York instead should be allowed to leave to the state of residence all policy determinations regarding which personal expenses should be allowed as income tax deductions to that state's residents.

A number of state courts have approved the denial to nonresidents of personal deductions while allowing them to residents, and this Court has not invalidated this approach, choosing instead to dismiss the nonresidents' appeals. In *Matter of Goodwin v. State Tax Commission, supra*, the New York Appellate Division relied heavily upon the fact that the deductions there at issue (real property tax on out-of-state residence, mortgage interest, medical expenses and life insurance premiums) were personal expenses unrelated to the taxpayer's New York activities. Regarding the fact that residents were allowed such deductions even in the absence of a connection to their income producing activities, the court stated that the factor of residence had an obvious connection with the allowance of the personal expense deductions at issue, which, if allowed as deductions at all, should be allowed by the state of the taxpayer's residence:

The expenditures are properly associated with the place where the taxpayer resides. They all relate to the personal activities of the taxpayer and his personal activities must be deemed to take place in the State of his residence, the State in which his life is centered. The expenditures in controversy in this case are clearly a part of the petitioner's personal activities in his home State.

286 App. Div. at 701, 146 N.Y.2d at 180. Additionally, the court noted that the deductions at issue each embodied a governmental policy designed to serve a legitimate social end and that such policies were peculiarly related to the factor of residence within the state. The court found that the deductions could thus be limited to state residents, stating that in the exercise of its general governmental power to advance the welfare of its residents, the state could give aid and encouragement of the character embodied in the tax deductions to its own residents without being constitutionally required to extend similar aid or encouragement to residents of other states. 286 App. Div. at 702, 146 N.Y.S.2d at 180. *See also Wilson v. Department of Revenue*, 267 Or. 103, 514 P.2d 1334 (1973), *appeal dismissed for want of a substantial federal question*, 416 U.S. 964 (1974) (upholding provision limiting nonresident deductions to those connected with state source income, although residents were allowed certain non-income related personal deductions); *accord Stiles v. Currie*, 254 N.C. 197, 118 S.E.2d 428 (1961) (same).

Similarly, in *Lung v. O'Chesky*, 94 N.M. 802, 617 P.2d 1317 (1980), *appeal dismissed for want of a substantial federal question*, 450 U.S. 961 (1981), the Supreme Court of New Mexico upheld a New Mexico tax statute that denied to

nonresidents grocery and medical tax rebates given to New Mexico residents. The court found that the state's objective was to grant relief from gross receipts and property taxes to low-income individuals who actually paid those taxes. The court stated that the Legislature could reasonably believe that nonresidents did not actually pay those taxes, so rebates given to them would not afford relief for monies exacted by New Mexico. 94 N.M. at 805, 617 P.2d at 1320.

Likewise, in *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed for want of a substantial federal question*, 390 U.S. 714 (1968), the Supreme Court of Nebraska upheld against a Privileges and Immunities Clause challenge that state's allowance of a food sales tax credit only to residents on the ground that food purchases for personal use are so closely related to the state of residence that any credit should be allowed only by such state. 182 Neb. at 407-408, 155 N.W.2d at 332.¹³

¹³*See also Baker v. Matheson*, 607 P.2d 233 (Utah 1979) (upholding limitation of general fund rebates to residents to compensate them for increased housing costs); *Rubin v. Glaser*, 83 N.J. 299, 416 A.2d 382 (1980), *appeal dismissed for want of a substantial federal question*, 449 U.S. 977 (1980) (upholding homestead tax rebate limited to residents' principal residence); *Berry v. State Tax Commission*, 241 Or. 580, 397 P.2d 780 (1964), *appeal dismissed for want of a substantial federal question*, 382 U.S. 16 (1965) (upholding disallowance of nonresidents' personal deductions, including medical expenses and interest on out-of-state loans). *But see Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988) (disallowance of nonresident's alimony deduction pursuant to tax statute which allowed nonresidents to deduct only amounts attributable to their Oregon-source income

Goodwin, Lung and Anderson establish the proposition that, in furtherance of their sovereign powers to provide public benefits and services to those residing within the territories that they govern, states may limit personal deductions, such as the deduction for alimony, to residents and not be in violation of the Privileges and Immunities Clause. As was recognized in *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383 (1978), states must be able to distinguish between their residents and residents of other states for some purposes if states are to survive as sovereign political entities in our federal system. *Id.* at 383 (holding that certain rights and benefits, such as voting and holding elective office, may properly be limited to residents); see also J. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 490 (1981) (Privileges and Immunities Clause cannot be absolute, because fulfillment of the fundamental obligation of state government -- to care for the state's own residents -- depends to some degree on the ability to withhold from others what a state provides to its own).

It is for this reason, among others, that a "virtually *per se* rule of invalidity" akin to that applied under the Commerce Clause to state taxes that patently discriminate against interstate commerce, see, e.g., *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994), should not be applied to state taxes under the Privileges and Immunities Clause. The two clauses have different aims and set different standards for state conduct. *United Building and Construction Trades Council of Camden*

held, without extensive analysis, to violate the Privileges and Immunities Clause); *Borden v Selden*, 259 Iowa 808, 146 N.W.2d 306 (1966) (land tax credit available only to resident owners of Iowa land violated Privileges and Immunities Clause).

County v. Mayor and Council of the City of Camden, 465 U.S. 208, 219-220 (1984) (declining to transfer mechanically into the Privileges and Immunities Clause an analysis fashioned to fit the Commerce Clause). The Commerce Clause applies to one subject only -- interstate commerce -- and in its Commerce Clause jurisprudence, this Court has determined that state laws which discriminate against interstate commerce are almost never valid. The Privileges and Immunities Clause, on the other hand, applies to a variety of different subjects "bearing on the vitality of the Nation as a single entity," *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. at 383, where distinctions between residents and nonresidents may sometimes be appropriate. Accordingly, this Court's existing standard of review under the Privileges and Immunities Clause recognizes that the Clause should not automatically invalidate all state differences in treatment of residents and nonresidents. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

Moreover, this Court's Commerce Clause interpretations are subject to legislative review by Congress, allowing the states an avenue of political recourse from an adverse decision. The inability of the states to persuade Congress to change legislatively an adverse decision under the Privileges and Immunities Clause further justifies this Court's application of a less rigorous standard of review under the Privileges and Immunities Clause than under the Commerce Clause. cf. *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992) (in the exercise of its commerce power, Congress may authorize state actions that burden interstate commerce, but Congress cannot authorize violations of the Due Process Clause).

Petitioners contend (Pet. Br., pp. 11-12) that the Court of Appeals was wrong to say that the alimony payments were

personal expenses wholly linked to Mr. Lunding's personal activities outside New York. Petitioners assert that a New York link existed because such payments were mandated by a final Connecticut court judgment which was entitled to full faith and credit in New York and every other state. However, such link is too attenuated to be constitutionally significant. The alimony payments were not ordinary and necessary expenses paid or incurred in carrying on Mr. Lunding's New York trade or business (*see, e.g.*, 26 U.S.C. § 162[a]) or for the production of his New York income (*see, e.g.*, 26 U.S.C. § 212[1]). Although the amount of the alimony payments may have been based on Mr. Lunding's income from New York (and elsewhere), the origin of the claim giving rise to the alimony obligations was entirely unrelated to Mr. Lunding's income producing activities in New York. *See, e.g., United States v. Gilmore*, 372 U.S. 39 (1963) (the origin of the claims in litigation resulting from marital dissolution was personal, so the expenses of contesting the litigation were nondeductible personal expenses). The alimony obligation simply had nothing to do with where Mr. Lunding earned his income. Connecticut was the state of Mr. Lunding's residence during 1990, the state in which his life was centered. Accordingly, the Court of Appeals was correct in finding the alimony payments "wholly linked" to personal activities outside New York.¹⁴

¹⁴Additionally, other factors, not affecting the outcome of this case, further illustrate the lack of connection between New York and Mr. Lunding's alimony payments. Connecticut, not New York, was the forum of the former marriage, where the marital obligation culminating in the alimony obligation arose (18a). Connecticut was the forum of the divorce, and the alimony was payable pursuant to a Connecticut Superior Court judgment (18a). Connecticut was the state of the former wife's residence during 1990 (19a).

Finally, petitioners argue that Tax Law § 631(b)(6) applies based solely on the residence of the alimony payor, without regard to whether the marriage and divorce occurred in New York (Pet. Br., p. 11), or, for that matter, whether the alimony recipient resides in New York. Although accurate, petitioners' observation is legally irrelevant. Regardless of where the marriage and divorce occurred or where the alimony recipient resides, the Privileges and Immunities Clause permits New York to limit personal deductions, including alimony, to residents and leave residents of other states to whatever tax relief their own states may afford them. Accordingly, New York's income tax treatment of alimony paid by nonresidents does not violate the Privileges and Immunities Clause.

CONCLUSION

**FOR THE FOREGOING REASONS, THE ORDER
OF THE NEW YORK STATE COURT OF
APPEALS DECLARING TAX LAW § 631(b)(6) TO
BE CONSTITUTIONAL SHOULD BE AFFIRMED.**

Dated: Albany, New York
August 1, 1997

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Supreme Court, U.S.
FILED

AUG 4 1997

CLERK

No. 96-1462

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996**

**CHRISTOPHER H. LUNDING,
BARBARA J. LUNDING,**

Petitioners,

v.

**TAX APPEALS TRIBUNAL OF THE STATE
OF NEW YORK, COMMISSIONER OF
TAXATION AND FINANCE OF THE
STATE OF NEW YORK,**

Respondents.

On Writ of Certiorari to the
Court of Appeals of the State of New York

**BRIEF OF THE STATES OF OHIO, ARKANSAS,
CALIFORNIA, HAWAII, IDAHO, ILLINOIS,
MISSOURI, MONTANA, NORTH CAROLINA,
UTAH, VERMONT, WEST VIRGINIA AND
WISCONSIN**

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STATEMENT OF AMICI INTEREST

Amicus State of Ohio and 12 other *amici* States write to urge the Court to affirm the decision of the New York Court of Appeals and to explain why the issue presented matters not just to New York but to her sister States as well.

The *amici* States all raise revenue in order to supply vital governmental services to residents and non-residents alike, and do so through a variety of taxes, including income, sales and property taxes. In supporting New York in this case, the *amici* States wish to ensure that what has long been true in performing this vital government task remains so -- namely, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Austin v. New Hampshire*, 420 U.S. 656, 661-62 (1975) (citation omitted).

Attempting to alter this bedrock principle, petitioners invoke the privileges and immunities clause to propose a constitutional rule of rigid equality between expenses deductible for residents and expenses deductible for nonresidents, even though the States have power to tax fully only the income of the former but not the income of the latter. The proposal disregards the long-respected flexibility given to the States in levying taxes, ignores case law from this Court upholding similar tax classifications and in the final analysis jeopardizes many other tax classifications deployed by the States which are equally reasonable in nature. For these reasons and those added below, we respectfully submit this brief.

SUMMARY OF ARGUMENT

The privileges and immunities clause, to be sure, prevents States from singling out nonresidents for disfavorable treatment. *Austin v. New Hampshire*, 420 U.S. 656 (1975). But, in doing so, it does not require the States

to establish "precise equality" between the two groups. *Travellers' Ins. Co. v. Connecticut*, 185 U.S. 364, 371 (1902). In view of the different stance of residents and nonresidents when it comes to paying taxes and sharing the revenue generated by them, the States may treat the two groups differently -- as long as they do not create "unreasonable" distinctions between them, *Shaffer v. Carter*, 252 U.S. 37, 57 (1920), and as long as they provide a "reasonably fair distribution of burdens" between them, *Travellers' Ins.*, 185 U.S. at 371. Nor for like reasons does the clause markedly intrude upon the States' traditional flexibility "to pursue [their] own fiscal policies" through a variety of tax classifications. *Wisconsin v. J.C. Penney*, 311 U.S. 435, 444 (1940). See also *Austin*, 420 U.S. at 661-62. All that the clause asks of the States is that they create reasonable distinctions in principle which create substantial equality in effect between the two groups.

Examined under this test, New York clearly passes. As an initial matter, the privileges and immunities clause does not require New York to create parallel tax requirements for residents and nonresidents because the due process clause does not permit it. While the States may tax all income of their residents, whether earned in-State or not, due process prohibits them from taxing the income of nonresidents earned outside their State. Thus, on the income side of the equation, New York has drawn the same constitutionally-required distinction that all 39 income-tax States draw: It imposes a global income tax on all income of its residents, but only a partial income tax on the New York-derived income of its nonresidents.

Under these circumstances, it was well within New York's fiscal powers to adhere to this jurisdictional limit on the deduction side of the equation. Having limited its taxation of nonresidents to in-State income, New York quite

legitimately chose to limit the availability of deductions to expenses incurred in earning that income. Thus, residents may take all customary income tax deductions for personal expenses, be they for alimony, life insurance, property taxes, individual retirement accounts, and the like, while nonresidents may not. The distinction of course flows not from any animus to out-of-staters, but from the reasonable (and constitutionally-required) restriction against taxing all income of nonresidents and the sensible fiscal decision not to grant a tax windfall to nonresidents.

In implementing this policy, New York has simply taken the view that alimony payments do not represent an income-earning expense related to New York, but represent a legal requirement unique to social policies (specifically the marriage laws) of the State of the taxpayer's residence. In neither design nor effect does this reasonable system violate the privileges and immunities clause.

In *Shaffer v. Carter*, 252 U.S. 37 (1920), the Court approved a similar method of income attribution and expense deduction. It allowed the State to deny nonresidents a deduction for business losses incurred outside the taxing state, even though the State authorized residents to take such a deduction. Because "jurisdiction extends only to [nonresidents'] property owned within the state and their business, trade, or profession carried on therein," the Court found "no obligation to accord to them a deduction by reason of losses elsewhere incurred." *Id.* at 56-57. See also *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 73 (1920) (allowing New York to limit nonresident deductions to those related to the generation of New York income). In the last analysis, alimony obligations, like the out-of-state business losses in *Shaffer*, have no connection to the generation of nonresident income in the State and thus any deduction for such expenses properly may be limited to the State of residence.

A contrary approach would not only doom New York's statute but would also place at risk other income-tax deduction laws. Many States follow New York's situs-based approach with respect to alimony and other personal expenses.

ARGUMENT

I. State Distinctions Between Resident And Nonresident Taxpayers Meet The Requirements Of The Privileges And Immunities Clause If They Are Reasonable In Nature And Substantially Equal In Effect.

Under the Constitution of the United States, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., Art. IV, section 2. Like the full faith and credit clause that precedes it, the privileges and immunities clause ensures comity among the States and prevents individual States from isolating themselves and the benefits they provide from other States and from other States' citizens. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) ("It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned.").

Yet the clause imposes only a relative duty on the States, not an absolute one. The clause has never been construed to require States to treat residents and nonresidents alike with mathematical precision. States thus need not extend the franchise to nonresidents, need not provide the same college tuition breaks to nonresidents that they provide to residents, and in matters of taxation need not (because they

cannot) tax the same amount of income from residents that they tax from nonresidents.

In view of the legitimate differences in kind between residents and nonresidents, the clause gives the States ample latitude to respect those differences in drawing legal classifications in general and tax classifications in particular. Accordingly, State tax measures are valid under the clause so long as they are reasonable in nature, the Court has held: The measures just cannot be "unreasonable," *Shaffer v. Carter*, 252 U.S. 37, 57 (1920), they must have a "reasonable ground for the diversity of treatment," *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 79 (1920), they must be based on a "reasonable relationship" between the status of residents and nonresidents, *Hicklin v. Orbeck*, 437 U.S. 518, 525-26 (1978) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)), and they must provide a "reasonably fair distribution of burdens," *Travellers' Ins. Co. v. Connecticut*, 185 U.S. 364, 371 (1902). There thus is no requirement of "precise equality" in the treatment of residents and nonresidents, *Travellers' Ins.*, 185 U.S. at 371, and the clause does not bar "disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). All the clause requires of State legislators is that distinctions between residents and nonresidents be reasonable in nature and lead to "substantial equality in treatment." *Austin v. New Hampshire*, 420 U.S. 656, 665 (1975).

The modest nature of these requirements heeds the traditional discretion given to the States in matters of taxation. As one of the Court's more recent privileges-and-immunities decisions reiterates, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Austin*, 420 U.S. at 661-62 (quoting

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) and *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

II. New York's Treatment Of Residents And Nonresidents Meets These Modest Requirements.

A. Due Process Requires The States To Treat The Income Of Residents Differently From The Income Of Nonresidents.

In sizing up New York's statute against these standards, it initially is worth emphasizing an option that neither New York nor any other State has in legislating in this area. All agree that the State could not have met Mr. Lunding's allegation by enacting the most equal and most comity-driven of income tax statutes -- one that taxed all income (no matter where earned) of residents and nonresidents and one that permitted residents and nonresidents to take all deductions (no matter how loosely connected to earnings) in computing their income tax.

Even though such a statute would give nonresidents just what they usually want (precise equality of treatment), the privileges and immunities clause does not require such a law -- and, more to the point, the due process clause would not permit it. While the taxing power of the States extends to all income of residents, whether earned in State or out, see *Shaffer*, 252 U.S. at 57, it does not extend to the activities of nonresidents that occur, or property that is located, outside their jurisdiction, *id.*; *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 324-25 (1968); *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435, 441-42 (1944).

On the income side of the equation, the States' hands thus are tied. They simply cannot extend equal income treatment to residents and nonresidents. What due process prohibits, in short, the privileges and immunities clause cannot require.

B. The States May Limit Deductions For Nonresidents To Expenses That Are Linked To The Only Income -- Namely, In-State Income -- That The States Have Power To Tax.

No doubt the States' hands are not so tied on the deduction side of the equation. They do not face the same impediment to absolute equality of treatment because taxpayers like Mr. Lunding are (not surprisingly) more than willing to offer New York jurisdiction over their out-of-State alimony expenses. But surely that does not end the inquiry. The States may account for the mandatory differences in treatment between residential and nonresidential income in determining how to allocate deductions between them, above all because the distinction is eminently reasonable in nature and because the privileges and immunities clause looks not to "theoretical distinctions" but to the overall "practical effect and operation of the respective taxes as levied." *Shaffer*, 252 U.S. at 56.

That is all New York has done here. It has treated the Connecticut-based alimony expense just like the Connecticut-based income -- as unrelated to the New York-based income and therefore as undeserving of a New York-based deduction. While New York could adopt other methods of taxation, the privileges and immunities clause does not compel it to do so. Since New York may tax only those portions of the nonresident's income arising from a business within New York, the State acts well within its power by

taxing the full in-state income of the nonresident without granting deductions for personal expenses unrelated to the generation of that income. Quite simply, the privileges and immunities clause does not require individuals subject to different tax burdens to be afforded the same tax relief or what is worse -- compel States to allow nonresidents to slice off the benefits but not the burdens of residential status.

Nor will this approach have any more than a *de minimis* effect on the run-of-the-mill taxpayer or comity among the States. Indeed, petitioners' proposed rule would not even lessen the general tax burden on individual taxpayers, but merely shift revenue from New York to the State where the taxpayer resides. Today, 39 States (including Connecticut) have an income tax, and each of them provides a deduction or credit to residents for income-tax payments to other States. Thus, a personal expense deduction granted by New York to the nonresident (*e.g.*, for alimony) lowers the New York tax, but at the same time also lowers the deduction or credit in the State of residence. All things being equal, then, the taxpayer would pay roughly the same total tax in the two States, the only difference being that Connecticut would get more and New York less of the revenue.

The net effect of the alimony deduction would not be tax relief, but transfer of revenue to the State of residence. Far from furthering the goals of the privileges and immunities clause, such a constitutionally-compelled tax structure would simply lead to a systematic shift of revenue out of the States where the taxpayers actually earn their income. Although the States may agree to such a shift of revenue, no constitutional policy dictates it.

III. The Court Has Already Approved Similar State Tax Distinctions Between Residents And Nonresidents.

Not only do the Court's general teachings in this area support New York, so also do its specific instructions. In *Shaffer v. Carter*, 252 U.S. 37 (1920), the Court addressed a case very much like this one. At issue was an Illinois corporation's complaint that Oklahoma failed to allow it to deduct losses incurred outside the State in computing its Oklahoma income tax.

The Court rejected the claim of out-of-State discrimination. "The difference" between the two taxpayers, the Court held,

is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination.

Id. at 57. Continuing, the 8-1 Court reasoned that the differential treatment reflected a difference in kind between the tax obligations of the two entities.

As to residents [the State] may, and does, exert its taxing power over their income from all sources, whether within or without the state, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no reason to

accord them a deduction by reason of losses elsewhere incurred.

Id.

Like *Shaffer, Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), also concluded that "there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc. in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state." *Id.* at 75-76. *Travis*, then, also upheld a New York provision limiting a nonresident's income tax deductions to expenses "connected with income arising from sources within the state." *Id.* at 73. See also M. McIntyre & R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause*, 13 State Tax Notes 245 (July 28, 1997).

Nor do any of the statutes the Court has invalidated under the privileges and immunities clause parallel the New York law. See, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (invalidating bar on the practice of law by nonresidents but not residents); *Austin v. New Hampshire*, 420 U.S. 656 (1975) (invalidating a commuter tax imposed on nonresidents but not residents); *Toomer v. Witsell*, 334 U.S. 385 (1948) (invalidating a license fee 100 times greater for nonresidents than for residents); *Travis, supra* (invalidating State's denial of standard, as opposed to personal expense, exemptions to nonresidents).

IV. — A Contrary Approach Would Jeopardize Innumerable State Tax Laws.

Adoption of petitioners' argument also raises the specter that a host of State laws and regulations relying on

this distinction will be placed at risk. The States have enacted a wide array of tax laws that situs items of personal expense outside the State while permitting nonresidents to deduct the proportionate share of business and occupational expenses related to the generation of in-state income. Whether it be in the context of moving expenses, medical expenses, qualified retirement contributions, or other personal expenses, New York's distinction between residents and nonresidents is as widespread as it is time-honored. See *Matter of Goodwin*, 286 A.D. 694, 146 N.Y.S. 2d 172 (1955) (upholding denial to nonresident of deduction for real estate taxes on out-of-state home, mortgage interest on out-of-state home, medical expenses and life insurance premiums), *appeal dismissed*, 352 U.S. 805 (1956); *Stiles v. Currie*, 118 S.E.2d 428 (N.C. 1961) (upholding disallowance to nonresident of deduction for all expenses not related to in-state income); *Berry v. State Tax Comm'n*, 397 P.2d 780 (Or. 1964) (disallowance of deduction for medical expenses of nonresident upheld), *appeal dismissed*, 382 U.S. 16 (1965), *questioned*, *Wood v. Dep't of Revenue*, 749 P.2d 1169 (Or. 1988); *Anderson v. Tiemann*, 155 N.W.2d 322 (Neb. 1967) (personal deductions may be allowed to residents and denied to nonresidents), *appeal dismissed*, 390 U.S. 714 (1968); *Harris v. Commissioner of Revenue*, 257 N.W.2d 568 (Minn. 1977) (upholding denial of moving expense deduction to person moving out of State on ground that deduction must relate to production of income taxed by the State); *Taylor v. Conta*, 316 N.W.2d 814 (Wis. 1982) (upholding denial of moving expenses and recapture of capital gain on sale of house).

Several States, moreover, adhere to this distinction in the precise setting of alimony deductions. For example, Alabama, California, Illinois, Ohio, West Virginia, and Wisconsin all to one degree or another place limits on the deductibility of alimony expenses by nonresidents. See Ala.

Code 40-18-15(18) (1993 and 1996 Supp.); Cal. Rev. and Tax. Code 17302 (1988 and 1996 Supp.); Ill. Comp. Stat. Ann. C. 35 5/301(c)(2)(A) (Smith-Hurd 1996 and 1997 Supp.); Ohio Rev. Code Ann. 5747.20(B)(6) (Page's 1996); W. Va. Code Ann. 11-21-32(b)(4) (1995); Wis. Stat. Ann. 71.05(6)(a) (West 1989 and 1996 Supp.).

Even the United States itself honors this distinction. Section 873 of the Internal Revenue Code allows federal income tax deductions to aliens only to the extent the expenses are connected to income arising within the United States. The differential treatment has been understood to comply with United States treaty obligations mandating equal treatment of foreign taxpayers. *See* M. McIntyre & R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause*, 13 State Tax Notes 245, 247-49 (July 28, 1997).

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to affirm the decision of the New York Court of Appeals.

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August 4, 1997

No. 96-1462

Supreme Court, U.S.
FILED

AUG 27 1997

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Supreme Court of the United States

OCTOBER TERM 1996

CHRISTOPHER H. LUNDING, BARBARA J. LUNDING,

Petitioners,

—v.—

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COMMISSIONER OF TAXATION AND FINANCE OF THE
STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

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 ARGUMENT

**A. Section 631(b)(6) Of The New York Tax Law
 Clearly Discriminates Against Nonresidents**

In this Reply Brief, Petitioners address certain of the matters raised in the Brief ("Resp. Brf.") of Respondent Commissioner of Taxation and Finance ("Respondent"). In their opening brief, Petitioners argued forcefully that New York Tax Law Section 631(b)(6) ("Section 631(b)(6)") discriminates against nonresidents who pay alimony in that it denies

them substantial equality of treatment with residents in the taxation of personal income. In response, Respondent asserts that "the substantial equality of treatment required by the Privileges and Immunities Clause is satisfied." Resp. Brf. at 8. This assertion lacks the slightest support in the record or in law.

It is undisputed that Section 631(b)(6) was the sole basis upon which Petitioners were denied a proportionate deduction for alimony paid, increasing their 1990 New York State personal income tax burden by \$3,724, or almost 15%. In contrast, in *Austin v. New Hampshire*, 420 U.S. 656 (1975), the Court found a lack of substantial equality of treatment of non-residents sufficient to require more than bald assertion to avoid a holding of violation of the Privileges and Immunities Clause when a State tax statute increased the net tax payable on a nonresident's earnings by only \$242. *Id.* at 665-66, n.10. Thus, it is quite obvious that Section 631(b)(6) discriminates on its face against nonresidents, does not treat nonresidents with substantial equality and therefore "burdens one of those privileges and immunities protected by the [Privileges and Immunities] Clause," *United Building & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 218 (1984). This reality requires Section 631(b)(6) to be held unconstitutional unless there are demonstrated to be legally cognizable substantial reasons for this discrimination which bear a close relation to it.

B. The Justifications Offered For Section 631(b)(6) Are Insufficient To Support Its Constitutionality

Respondent also attempts to sustain the constitutionality of Section 631(b)(6) by asserting that Petitioners' "alimony payments were intimately connected to petitioners' personal and family activities outside New York." Resp. Brf. at i. Since there is nothing whatsoever in the record about any such "intimate" activities, whether within or without the State of

New York, this statement is mere puffery. Money is fungible, and until such time as it grows on trees, the vast majority of citizens of this country must pay their expenses by earning it through personal service. Indeed, it has been stipulated here that New York was the principal source of earned income of Petitioner Christopher H. Lunding in 1990, ALJ Determination at 2, Paragraph 1, App. 26a, and therefore obviously was a principal source of the funds from which his alimony obligation in that year was paid; and, equally obviously, Petitioners' alimony payments were connected with income arising from New York sources.

In any event, once Petitioners' standing is established (which obviously it is here), the particular facts of Petitioners' personal and family life have no relevance to the legal issues at hand. This is because when a statute is attacked as unconstitutional on its face, the proper test of its constitutionality is not the amount of wrong done in the instant case, but what may be done in other cases, *Montana Co. v. St. Louis Mining and Milling Co.*, 152 U.S. 160, 169 (1894); that is, the constitutional validity of a statute on its face is to be tested not by what has been done under it, but rather by what may, by its authority, be done. *Id.* at 170. See, e.g., *Planned Parenthood Ass'n of Chicago v. Kempiners*, 700 F.2d 1115, 1124 (7th Cir. 1983) (describing this test of constitutionality as "well-settled"). As the lower court recognized in *Travis*, "it is the personal knowledge of us all that the only appreciable source of income of thousands of nonresidents . . . lies within the confines of this state" *Yale & Towne Mfg. Co. v. Travis*, 262 F. 576, 581 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920); and analytically it is in reference to the legal interest of all alimony paying nonresidents, as well as their own particular interest, that Petitioners proceed here. Put concisely, when, as here, a statute discriminates against nonresidents solely on the basis of their status as such, its constitutionality may not be defended by reference to

facts and issues extraneous to that pure and unitary basis for discrimination.¹

Dicta in the *Travis* case said to approve of the constitutionality of former Section 360, Paragraph 11 of the New York tax laws are not to the contrary. The statute there referred to provided that a nonresident was not allowed to take deductions against New York income except to the extent connected with income arising from sources within New York. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 73 (1920); and the opinion below in that case stated as a fact that "nonresidents are allowed such proportion of deduction as the income arising from sources within [New York] bears to the total income," 262 F. at 577. It was in this factual context that dicta in *Travis* regarding deductions should be considered. In contrast, Section 631(b)(6) arbitrarily determines by legislative fiat that alimony payments by nonresidents never can be considered to any extent to be New York sourced; in this lies its unconstitutionality.

It is regrettable that the New York Court of Appeals did not acknowledge here its own decision in *Smith v. Loughman*, 245 N.Y. 486, 157 N.E. 753, cert. denied, 275 U.S. 560 (1927), in which a New York statute imposing a tax at rates different than those borne by residents on transfers by will or intestate succession of New York property owned by nonresidents was declared to violate the Privileges and Immunities Clause.

Speaking for the court, Chief Judge Cardozo observed of that statute:

In some instances the burden for the non-resident is vastly heavier than for the resident In other instances . . . the burden for the non-resident may be lower than for the resident. Whether these inequalities will balance one another in the long run as applied to

¹ One such extraneous issue is whether or not in 1990 Connecticut taxed the earned income of its residents, which in that year it did not.

non-residents generally, we can do little more than guess. What is certain is that the inequalities will not balance, but will inevitably persist, whenever certain classes of non-residents . . . are compared with like classes of residents. What is also certain is that non-residence without more has been made the basis for the divergent burdens of one class and another.

Id. at 492-93, 157 N.E. at 755.

The court then held discrimination in rates "[d]eeper by far and wider" than the discrimination in exemptions in *Travis*, 245 N.Y. at 495, 157 N.E. at 756, and concluded by holding that:

The principle of equal treatment for the citizens of all the States is a good more precious than the gain of revenue in one year or another. We are not to whittle it down by refinement of exception or by the implication of a reciprocal advantage that is merely trivial or specious. The principle is put in jeopardy—there is set in it an entering wedge that may be the beginning of its destruction—if this statute is upheld.

Id. at 496-97, 157 N.E. at 757. Based on these fundamental principles, long and consistently applied, the constitutionality of Section 631(b)(6) of the New York Tax Law cannot be sustained.

CONCLUSION

For the foregoing reasons, the judgment below of the Court of Appeals of New York should be reversed, and Section 631(b)(6) of the New York Tax Law declared to be unconstitutional and in conflict with the Privileges and Immunities Clause (Article IV, Section 2) of the Constitution of the United States.

Dated: August 27, 1997

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